Supreme Court, U.S.
FILED

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No. ——

In the Supreme Court of the United States

ABN AMRO Mortgage Group, Inc.,
a Delaware corporation,

Petitioner,

v.

GREGORY AND MARAGART WEIZEORICK,
Individually, and on behalf of all others similarly situated,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

This proceeding involves a question of exceptional importance, namely whether an anti-kickback statute, Section 8(b) of the Real Estate Settlement Procedures Act (12 U.S.C. § 2607(b)) ("RESPA") can be used to punish a lender who merely receives a fee for a service that it intends to perform but ultimately does not perform without knowing that another party has charged a similar fee. In *Echevarria v. Chicago Title & Trust Co.*, 256 F.3d 623 (7th Cir. 2001), the United States Court of Appeals for the Seventh Circuit held that RESPA requires allegations that the defendant actually "***shared*** an unearned fee with a third party." 256 F.3d at 627 (emphasis added). In *Echevarria*, the Seventh Circuit held that mere retention of a portion of the total sum paid ***does not*** constitute a fee split for purposes of RESPA. *Id.* at 626-27.

However, in the present case, the Court of Appeals, in conflict with its prior decision in *Echevarria* and the plain language of Section 8(b) of RESPA, held that RESPA does not "require that the plaintiff allege that all of the parties involved in [an alleged] fee splitting ***have knowledge of their participation in, or a conspiracy to join in, an illegal arrangement.***" (emphasis added). By extending the reach of RESPA to parties who have no knowledge that their fees are duplicative of separate fees charged by others, the Court of Appeals transformed RESPA from an anti-kickback statute to a statute that punishes mere innocent fee collection oversights. The effect of the Court of Appeals' holding is to make RESPA violations out of untold thousands of ordinary errors committed by parties far removed from the closing of a federally related mortgage transaction. Thus, because the Court of Appeals' decision significantly departs from the common understanding that RESPA is fundamentally an anti-kickback statute and radically expands the scope of RESPA's

reach to punish inadvertent conduct, petitioner respectfully requests that *certiorari* be granted on the following question:

May a lender that charges a fee for a service that it intends to perform, but ultimately does not perform, be held liable for sharing an unearned fee with a third party in violation of Section 8(b) of the Real Estate Settlement Procedures Act, 12 U.S.C. § 2607(b), when an independent settlement agent who controls the settlement receives a separate fee for the same service and performs that service ***without the knowledge of the lender***?

PARITIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner ABN AMRO Mortgage Group, Inc. ("AAMG") is a Delaware Corporation. AAMG's parent corporations are: (1) Standard Federal Bank, NA; (2) LaSalle Bank Corp.; and (3) ABN AMRO Bank NV. No publicly held company owns 10 percent or more of AAMG's stock.

The respondents are Gregory and Margaret Weizeorick. The Weizeoricks were plaintiffs-appellants in the underlying proceeding. The Weizeoricks are citizens of the State of Illinois.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, ABN AMRO Mortgage Group, Inc. ("AAMG"), respectfully petitions for a writ of certiorari to review the decision and opinion of the United States Court of Appeals for the Seventh Circuit entered on July 24, 2003.

OPINIONS BELOW

The Opinion of the Court of Appeals is reproduced in Appendix B. The prior Opinion of the United States District Court for the Northern District of Illinois is reproduced in Appendix C.

JURISDICTION

The Court of Appeals' decision was entered on July 24, 2003. ABN AMRO Mortgage Group, Inc. filed a timely petition for rehearing on August 5, 2003. The Court of Appeals denied ABN AMRO Mortgage Group, Inc.'s petition on September 17, 2003. App. A, infra, pp. 1a-2a. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Section 8(b) of the Real Estate Settlement Procedures Act, 12 U.S.C. § 2607(b), provides:

> **Splitting charges.** No person shall give and no person shall accept any portion, split, or percentage of any charge made or received for the rendering of a real estate settlement service in connection with a transaction involving a federally related mortgage loan other than for services actually performed.

STATEMENT OF THE CASE

A. Factual Background

This action arises out of the Weizeoricks' repayment of their prior mortgage loan to ABN AMRO Mortgage Group, Inc. ("AAMG"), the holder of the mortgage. At the request of the Weizeoricks or their agent, AAMG provided the Weizeoricks with a Payoff Statement on or about July 18, 2000. Among the charges listed on the Payoff Statement was a "Recording Discharge/Release of Lien Fee" in the amount of $10. At the time AAMG issued this Payoff Statement, it had no knowledge that the Weizeoricks intended to pay off the loan through a sale of the real estate securing the loan or that the Weizeoricks' purchasers intended to finance their purchase of that real estate through the closing of a federally related mortgage transaction.

Two weeks later, on July 24, 2000, without any notice to or knowledge by AAMG, the Weizeoricks closed the federally related mortgage transaction in connection with the sale of the real estate which secured AAMG's prior mortgage. Since AAMG was not a party to that transaction, AAMG had no way of knowing that a fee for recording the discharge/release of mortgage was made by the Weizeoricks' closing agent in the amount of $25.60 ***in addition to the $10.00 fee for the same service that was included in the Payoff Statement issued by AAMG two weeks earlier***. At this point, AAMG did not even know that its loan would be paid off through the proceeds of a federally related mortgage transaction. On the other hand, the Weizeoricks and their closing agent had full opportunity to review the Payoff Statement and the closing figures for that transaction and to know that a duplicate fee was being charged. Despite what the Weizeoricks and their closing agent knew or should have

known, the Weizeoricks directed the closing agent to send AAMG the full amount stated in its Payoff Statement (including the recording fee) and directed that the closing agent be paid a separate recording fee as indicated in the agent's closing statement. Ultimately, the closing agent, not AAMG, recorded the discharge/release of mortgage. At no time prior to filing suit did the Weizeoricks ever notify AAMG that the title company had collected a separate fee or request AAMG to refund the disputed $10.00 fee.

B. The District Court Proceedings

On February 1, 2001, the Weizeoricks filed a Class Action Complaint against AAMG, purporting to state a claim for violation of Section 8(b) of the Real Estate Settlement Procedures Act ("RESPA"), 12 U.S.C. § 2601, *et seq*. The Weizeoricks also asserted claims for breach of contract, restitution, and violation of the Illinois Consumer Fraud Act, 815 ILCS 505/1, *et seq*. The Weizeoricks invoked the jurisdiction of the District Court pursuant to Section 16 of RESPA (12 U.S.C. § 2614) and 28 U.S.C. § 1331 and, as to their state law claims, supplemental jurisdiction under 28 U.S.C. § 1367.

The Weizeoricks alleged that, because (1) they paid separate fees for the recording of the discharge/release of their mortgage to AAMG and the title company, serving as the Weizeoricks' closing agent, and (2) the title company, not AAMG, recorded the discharge/release of their mortgage, AAMG violated Section 8(b) of RESPA (12 U.S.C. § 2607(b)). That section provides:

> No person shall give and no person shall accept any portion, split, or percentage of any charge made or received for the rendering of a real estate settlement

service in connection with a transaction involving a federally related mortgage loan other than for services actually performed.

By Order dated November 16, 2001, the United States District Court for the Northern District of Illinois dismissed the Weizeoricks' Complaint on the grounds that they had "failed to plead facts showing that Defendant illegally shared fees with the third party title company" because, since "the title company had no involvement in the unearned $10 fee accepted by [AAMG], it is not considered as a third party for purposes of RESPA § 8(b)." App. C, infra, p. 21a. Relying on *Echevarria v. Chicago Title & Trust Co.*, 256 F.3d 623 (7th Cir. 2001), the District Court found that "unearned fees are not actionable under RESPA unless they are shared by at least two parties." App. C, infra, p. 21a. Because the Weizeoricks accused AAMG of nothing more than having charged and collected an unearned $10 fee, and the title company had no involvement in the unearned $10 fee accepted by AAMG, the District Court held that the Weizeoricks had "failed to plead fact showing that Defendant illegally shared fees with the third party title company." App. C, infra, p. 21a.

Following the District Court's dismissal of the Weizeoricks' RESPA claim, AAMG moved for dismissal of the remaining state law claims, pursuant to 28 U.S.C. § 1367(c). In response, the Weizeoricks moved for reconsideration of the dismissal of their RESPA claim. On June 25, 2002, the District Court denied the Weizeoricks' request for reconsideration, and granted AAMG's motion for dismissal of the state-law claims pursuant to 28 U.S.C. § 1367(c).

C. The Court Appeals' Decision

The Weizeoricks appealed from the District Court's decisions. On July 24, 2003, the United States Court of Appeals for the Seventh Circuit reversed the District Court's dismissal of the Weizeoricks' RESPA claim and remanded the case for further proceedings. The Court of Appeals found that the Weizeoricks' Complaint stated a cause of action for violation of Section 8(b) of RESPA, despite the fact that the Weizeoricks had not alleged that AAMG had known of the alleged fee splitting. The Court of Appeals acknowledged that subjecting an existing lender to RESPA liability for mere wrongful collection of fees "would radically, and wrongly, expand the class of cases to which RESPA applies." App. B, infra, p. 9a. Nevertheless, relying on *Christakos v. Intercounty Title Co.*, 196 F.R.D. 496 (N.D. Ill. 2000), the Court of Appeals found that RESPA does not "require that the plaintiff allege that all the parties involved in the fee splitting have knowledge of their participation in, or a conspiracy to join in, an illegal arrangement." App. B, infra, p. 13a.

The Court of Appeals' decision misapprehends the meaning and scope of Section 8(b) of RESPA by rendering a lender that charges a settlement service fee liable under RESPA whenever a title company that controls the settlement receives a separate fee for the same service without the lender's knowledge. By extending the reach of RESPA to parties that have no knowledge that their fees are duplicative of fees charged by others, the Court of Appeals effectively transformed RESPA from an anti-kickback statute into a statute that punishes mere innocent fee collection oversights. This result would make RESPA violations out of untold thousands of ordinary inadvertent errors caused by entities that are not parties to a federally related mortgage transaction and do not even know that the proceeds they receive are

derived from a federally related mortgage transaction – a result that has no basis in the language of the statute.

REASONS FOR GRANTING THE PETITION

The Court of Appeals' decision erroneously and radically expands the scope of Section 8 of RESPA (12 U.S.C. § 2607(b)) to punish innocent unknowing conduct where a closing agent accepts a fee for a settlement service and the existing lender charges a separate fee for a similar service ***without the existing lender's knowledge*** of the duplicate fee and without the existing lender knowing that the service involved is a settlement service under RESPA. The Court of Appeals' decision misapprehends the meaning and scope of that anti-kickback statute and conflicts with prior decisions of that Court, as well as those of other jurisdictions.

A. The Court of Appeals' Decision Radically and Erroneously Applies RESPA to Innocent and Unknowing Conduct

The Court of Appeals' decision significantly misapprehends the meaning and scope of Section 8(b) of RESPA. The decision holds that that anti-kickback statute can be used to punish a lender who merely receives a fee for a service that it intends to perform but ultimately does not perform. The decision erroneously renders such a lender liable for violating RESPA whenever a title company that controls the settlement receives a ***separate fee*** for the same service ***without the knowledge of the lender*** and performs that service.

Previous decisions of the Court of Appeals for the Seventh Circuit (and the courts of other jurisdictions) have consistently held that RESPA is fundamentally an anti-kickback statute.

By extending the reach of RESPA to parties who have no knowledge that their fees are duplicative of fees charged by others, the Court of Appeals transformed RESPA from an anti-kickback statute to a statute that punishes mere fee collection oversights. This result would make RESPA violations out of untold thousands of ordinary inadvertent errors caused by entities that are not even parties to the transaction – a result that has no basis in the language of the statute.

It is well settled that RESPA is fundamentally "an anti-kickback statute." *Mercado v. Calumet Fed. Sav. & Loan Ass'n*, 763 F.2d 269, 270 (7th Cir. 1985). Its protections extend only to federally related mortgage transactions "where the defendant gave or received 'any portion, split, or percentage of any charge' to a third party." *Durr v. Intercounty Title Co.*, 14 F.3d 1183, 1187 (7th Cir.), cert. denied, 513 U.S. 811 (1994) (citing *Mercado*, 763 F.2d at 270-71). *See also Echevarria*, 256 F.3d at 627; *Christakos*, 196 F.R.D. at 503; *Willis v. Quality Mortgage USA, Inc.*, 5 F. Supp. 2d 1306, 1308-09 (M.D. Ala. 1998); *Barbosa v. Target Mortgage Corp.*, 968 F. Supp. 1548, 1558 (S.D. Fla. 1997); *Campbell v. Machias Sav. Bank,* 865 F. Supp. 26, 31 n.5 (D. Me. 1994); *Duggan v. Independent Mortgage Corp.*, 670 F. Supp. 652, 653-54 (E.D. Va. 1987). RESPA "requires at least two parties to share fees." *Durr*, 14 F.3d at 1187. Where the plaintiff's complaint does not allege any kickback to a third party, the plaintiff fails to state a claim under RESPA. *Id.*

Despite the well settled case-law holding that RESPA is an anti-kickback statute, requiring that at least two parties ***share*** a ***single fee***, the Court of Appeals held that Section 8(b) of RESPA can be used to punish an existing lender whenever a title company, who controls the settlement proceeds, receives

a ***separate fee*** for the same service ***without the knowledge of the lender***. Although the Court of Appeals acknowledges that subjecting an existing lender to RESPA liability for mere wrongful collection of fees "would radically, and wrongly, expand the class of cases to which RESPA applies," the Court of Appeals did just that by extending the reach of RESPA to punish parties who have no knowledge that their fees are duplicative of fees charged by others. App. B, infra, p. 9a.

There is no support for the Court of Appeals' radical extension of the scope of Section 8(b) of RESPA. While the Court of Appeals cited *Christakos v. Intercounty Title Co.*, 196 F.R.D. 496 (N.D. Ill. 2000), in support of its novel holding, the *Christakos* case in no way stands for the proposition that a lender may be punished for merely charging a duplicative, unearned fee.

In the *Christakos* case, Ms. Christakos refinanced her home and closed the transaction, with the title company acting as settlement agent at the closing. As in our case, the prior mortgagee issued a payoff letter which included a charge for recording the release of the existing mortgage. Then, at closing, the title company charged an additional fee for the same service. Then, in a situation totally ***opposite*** from that found in our case, ***the existing lender***, not the title company, recorded the release of Ms. Christakos' mortgage. The court held that Ms. Christakos' complaint stated a viable RESPA claim ***against the title company that had control over the closing*** and knowledge of all fees being charged.

Significantly, the *Christakos* holding was based upon allegations that the two recordation fee payments "were made from the same pool of funds from the loan proceeds over which [***the title company***], ***as settlement agent, had control and directed payments made from.***" 196 F.R.D. at 503

(emphasis added). In other words, in *Christakos*, the title company charged a fee to record the release of the existing mortgage even though it ***simultaneously*** was collecting a fee for the prior mortgagee to record the same release. Thus, the title company knowingly charged the owner two fees for the identical service that could only be performed once.[1]

In contrast, the Weizeoricks' Complaint in the instant case makes no allegation that the moneys paid to AAMG and to the title company were ever "pooled" by AAMG in any way, that the money paid to the title company was ever in AAMG's control, or that AAMG ***knew*** that the title company even received a recording fee. Accordingly, the fee-split required to invoke RESPA is plainly lacking here. Unlike the title company in *Christakos*, AAMG did not have control over the settlement of the sale, was not even a party to that settlement and had no knowledge of any terms of the settlement, including the fact that the title company was going to charge a fee already included in AAMG's Payoff Statement, as AAMG issued its Payoff Statement on July 18, 2000, six days prior to the July 24, 2000 closing.

AAMG did no more than charge and collect a $10 fee, which the Weizeoricks allege was unearned. This is simply not actionable under RESPA. The fact that the Weizeoricks' closing agent collected that $10 fee charged by AAMG and handed that fee over to AAMG does not transform this case

[1] Indeed, even the knowing conduct of a title company, such as that which took place in *Christakos*, has not been uniformly deemed a RESPA violation. In *Monroe v. Citywide Title Corp.*, No. 02 C 2101, 2003 U.S. Dist. LEXIS 4146 (N.D. Ill. March 12, 2003), a case which was decided three years ***after*** *Christakos*, the Court ruled that the ***exact same conduct*** alleged in *Christakos* could not be turned into a RESPA Section 8(b) claim. *Monroe*, 2003 U.S. Dist. LEXIS 4146, at *6.

into *Christakos*. Control over the closing and knowledge of duplicative fee collection, while not separate elements of a RESPA claim, are indicia of whether the accused party was engaged in the type of improper kick-back or fee-split prohibited by RESPA. A party who did nothing more than charge and collect a fee without knowledge that a third party received a separate fee has not shared an unearned fee or engaged in any kick-back scheme.

The Court of Appeals' decision radically expands the class of cases to which RESPA applies, and significantly extends the intended scope of RESPA's reach to punish mere fee collection oversights. Because the Court of Appeals' decision departs significantly from the well-settled understanding that RESPA is fundamentally an anti-kickback statute, this Court should exercise its supervisory powers to clarify the intended meaning and scope of the statute.

B. The Court of Appeals' Decision Conflicts With Its Prior Decisions that Section 8(b) of RESPA is Not Violated Unless the Defendant Knowingly Splits a Fee With a Third Party

Previous decisions of the Court of Appeals (as well as the courts of other jurisdictions) have suggested that RESPA is fundamentally an anti-kickback statute, which is violated only if a defendant ***knowingly*** splits a fee with a third party for a service which the defendant does not actually perform. *See Echevarria*, 256 F.3d at 627; *Durr*, 14 F.3d at 1187; *Christakos*, 196 F.R.D. at 503; *Willis*, 5 F. Supp. 2d at 1308-09; *Barbosa*, 968 F. Supp. at 1558; *Campbell,* 865 F. Supp. at 31 n.5; *Duggan*, 670 F. Supp. at 653-54. Indeed, in *Echevarria*, the Seventh Circuit recently reaffirmed that, absent allegations of an ***actual*** kickback or fee-split with a third party, there can be no RESPA claim. 256 F.3d at 626.

Specifically, the court in *Echevarria* held that a plaintiff who "fail[s] to accuse a third party of accepting unearned fees" cannot proceed under RESPA. *Id.* at 627 (emphasis added).

In *Echevarria*, as in our case, the plaintiffs misguidedly argued that a fee-split need not be literal for purposes of RESPA, but that, rather, fees are split whenever two entities receive fees for a service and the sum total of those fees is more than the service actually cost. *Id.* at 626. Specifically, the plaintiffs in *Echevarria* argued that a $45 fee that they paid to their title company "was illegally split when [the title company] paid a third party, the County Recorder, a portion of the fees . . . and retained the overcharges . . . for itself." *Id.* According to the plaintiffs, a "focus on the whole $45.00" revealed a fee split because $45 was the total amount plaintiffs paid for recordation of the release of their mortgage, and the defendant, in the end, retained a portion of that sum. *Id.* However, the Seventh Circuit rejected the plaintiffs' argument, explaining that RESPA requires allegations that the defendant actually "***shared*** an unearned fee with a third party." *Id.* at 627 (emphasis added). According to the court, mere retention of a portion of the total sum paid ***does not*** constitute a fee-split for purposes of RESPA. *Echevarria*, 256 F.3d at 626-27.

The Weizeoricks have failed to allege any fee-split, fee-sharing, or kickback of any kind. Indeed, their claim is even less akin to the type of fee-splitting RESPA addresses than was the claim rejected by the court in *Echevarria*. In the Weizeoricks' case, there are no allegations that any funds were shared between AAMG and a third party or transmitted in any way by AAMG to a third party. The Weizeoricks have merely alleged that AAMG collected an unearned fee. Nevertheless, the Court of Appeals held that the Weizeoricks'

Complaint stated a cause of action under Section 8(b) of RESPA.

In conflict with both its prior decisions, and the plain language of the statute, the Court of Appeals found that RESPA does not "require that the plaintiff allege that all of the parties involved in the fee splitting have knowledge of their participation in, or a conspiracy to join in, an illegal arrangement." App. B, infra, p. 13a. In so holding, the Court of Appeals impermissibly extended the reach of RESPA to parties who have no knowledge that their fees are duplicative of fees charged by others. In effect, the Court of Appeals transformed RESPA from an anti-kickback statute to a statute that punishes mere inadvertent conduct. Because the Court of Appeals decision radically, and wrongfully, expands the class of cases to which RESPA applies, it is necessary and important for this Court to exercise its supervisory powers to review, and correct, the Court of Appeals' erroneous holding.

CONCLUSION

For the reasons stated, a writ of certiorari should issue to review the judgment and opinion of the Seventh Circuit.

Respectfully submitted,

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APPENDIX A

United States Court of Appeals
For the Seventh Circuit

No. 02-2801

[Filed September 17, 2003]

Gregory & Margaret Weizeorick, individually and on behalf of all others similarly situated, Plaintiffs-Appellants,	)
v.	)
ABN AMRO Mortgage Group, Inc., a Delaware corporation, Defendant-Appellee.	)

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division
No. 01 C 0713
Honorable William J. Hibbler

Before MANION, KANNE, and DIANE P. WOOD,
Circuit Judges

ORDER

On consideration of the petition for rehearing en banc filed by defendant-appellee, no judge in active service has requested a vote on the petition for rehearing en banc,[1] and all of the judges on the original panel have voted to deny rehearing. The petition is therefore DENIED.

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[1] Judge Flaum did not participate in the consideration of this petition.

APPENDIX B

United States Court of Appeals
For the Seventh Circuit

No. 02-2801

[Filed July 24, 2003]

Gregory & Margaret Weizeorick, individually and on behalf of all others similarly situated, Plaintiffs-Appellants,	)
v.	)
ABN AMRO Mortgage Group, Incorporated, a Delaware Corporation, Defendant-Appellee.	)

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division
No. 01 C 0713
Honorable William J. Hibbler

Before MANION, KANNE, and DIANE P. WOOD,
Circuit Judges

OPINION

MANION, Circuit Judge.

I.

On February 1, 2001, Gregory and Margaret Weizeorick filed suit alleging that ABN AMRO Mortgage Group Inc. violated the Real Estate Settlement Procedures Act, 12 U.S.C. § 2601, *et seq.*, and state law provisions, by illegally splitting a fee with the closing agency without performing any services. The district court determined that no fee split had occurred as a matter of law and dismissed their federal allegations for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6). The Weizeoricks appeal, and because they successfully pleaded a claim for relief, we reverse.

II.

On July 24, 2000, Gregory and Margaret Weizeorick closed on the sale of their home in Chicago, Illinois. In connection with the closing and the repayment of their mortgage, ABN AMRO Mortgage Group ("AAMG"), as holder of the mortgage, provided the Weizeoricks and the closing company with a "Payoff Statement" on July 18, 2000. The Payoff Statement included a charge of $10.00 for a "Recording Discharge/Release of Lien Fee." The Weizeoricks paid this fee at the closing of the sale of their home as part of the payoff of their mortgage loan. Also at closing, the Weizeoricks were charged a "Release Fee" of $25.60 by the closing company, Attorneys' Title Guaranty

Fund, Inc, as part of the "settlement charges" owed as the seller of the home. The Weizeoricks paid that fee as well.

On February 1, 2001, the Weizeoricks filed a class action lawsuit alleging that AAMG's practice of collecting $10.00 for "recording" services from borrowers at the closing on the sale of their homes violates the Real Estate Settlement Procedures Act ("RESPA"), 12 U.S.C. § 2601, *et seq.*, as well as state law. Specifically the Weizeoricks invoked Section 8(b) of RESPA, or 12 U.S.C. § 2607(b), which prohibits the receipt of a portion of a fee paid for real estate services without actually performing the service. *Id.* The Weizeoricks alleged that AAMG violated RESPA and Illinois state law by receiving $10.00 of the $35.60 fee for recording the discharge of their lien, even though AAMG did not record the release of the mortgage. According to the Weizeoricks' allegations, the title company, not AAMG, recorded the discharge/release of their mortgage.

AAMG subsequently moved to dismiss the Weizeoricks' entire complaint for failure to state a claim under Fed. R. Civ. P. 12(b)(6). The Weizeoricks withdrew their motion for class certification, likely because of the unique and somewhat complex series of transactions that occurred between the closing company and the title company. They instead proceeded as individual plaintiffs. On November 16, 2001, the district court, relying on *Echevarria v. Chicago Title and Trust Co.*, 256 F.3d 623 (7th Cir. 2001), dismissed the Weizeoricks' RESPA claim with prejudice, finding that the Weizeoricks had failed to allege that AAMG had illegally split fees with the closing agent. The district court determined that because the title company and AAMG had each independently charged the Weizeoricks a standard fee for the recording

service, there was no split of an unearned fee to a third party, as required by the statute. The Weizeoricks then moved to reconsider the dismissal of the RESPA claim and AAMG contemporaneously moved under 28 U.S.C. § 1367(c)(3) to dismiss the Weizeoricks' state law claims. The district court denied the Weizeoricks' motion, granted AAMG's motion, and dismissed the Weizeoricks' case in its entirety.

III.

On appeal, the Weizeoricks contend that the district court erred in dismissing their claim against AAMG because their allegations were sufficient to state a claim under § 2607(b) of RESPA.[1] They contend that the district court impermissibly interpreted § 2607(b) by requiring a plaintiff to allege that the defendant arranged for a third party to receive unearned fees in order to show a violation of the statute. The district court erred in this conclusion, they argue, because § 2607(b) of RESPA only prohibits a person from accepting an unearned portion of a charge for settlement services and does not require an allegation of whether or not the defendant had control of the settlement fee overcharge.

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[1] The Weizeoricks only appeal that part of the district court's November 16, 2001 order and opinion granting AAMG's Fed. R. Civ. P. 12(b)(6) motion to dismiss the Weizeoricks' federal law claim, which arose under RESPA, and that part of the district court' s June 25, 2002 order denying the Weizeoricks' motion to reconsider the dismissal of the RESPA claim. The June 25, 2002 order also granted, pursuant to 28 U.S.C. § 1367(c)(3), AAMG's motion to dismiss the remainder of the Weizeoricks' claims, all of which arose under state law. The Weizeoricks have not appealed the dismissal of their state law claims.

This court reviews *de novo* the district court's grant of AAMG's motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6). *See International Mktg., Ltd. v. Archer-Daniels-Midland Co.*, 192 F.3d 724, 729 (7th Cir.1999). Dismissal is proper "only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Hishon v. King & Spaulding*, 467 U.S. 69, 73, (1984).

To determine if dismissal was appropriate in this case we turn to the statutory basis for the Weizeoricks' suit. Section 8(b) of the RESPA provides:

> 1 .No person shall give and no person shall accept any portion, split, or percentage of any charge made or received for the rendering of a real estate settlement service in connection with a transaction involving a federally related mortgage loan other than for services actually performed.

12 U.S.C. § 2607(b).

The initial question then is whether Section 8(b) prohibits a party to a real estate transaction from simply accepting an unearned fee, or does it require that the unearned amount be part of a split or percentage of a charge. This court has explained that Section 8(b), entitled "Prohibition against kickbacks and unearned fees," is an anti-kickback measure that prohibits real estate settlement overcharges when a "portion" or "percentage" of the charge is kicked back to or "split" with a third party who performs no service.

> The statutory language describes a situation in which A charges B (the borrower) a fee of some sort, collects it, and then either splits it with C or gives C a portion or percentage (other than 50 percent--the situation that the statutory term "split" most naturally describes) of it. A might be a lawyer, and C a closing agent ..., and A might charge a legal fee to B and kick back a share of it to C for recommending to the borrower that he use A's services. That would be a form of commercial bribery and is the target of section 8(b).
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> —

Kzralic v. Republic Title Co., 314 F.3d 875, 881 (7th Cir. 2002). Our case law has consistently held that Section 8(b) is not violated unless the defendant splits a fee with a third party. *Kzralic*, 314 F.3d at 881; *Echevarria v. Chicago Title & Trust Co.*, 256 F.3d 623, 627 (7th Cir. 2001); *Mercado v. Calumet Fed. Sav. & Loan Ass'n*, 763 F.2d 269, 270 (7th Cir. 1985). We have stressed that "under RESPA's express terms," the broad protection of the statute "extends only over transactions where the defendant gave or received any portion, split, or percentage of any charge to a third party." *Durr v. Intercounty Title Co.*, 14 F.3d 1183, 1187 (7th Cir. 1994) (internal quotation omitted). For example, in *Echevarria*, we affirmed dismissal under Fed. R. Civ. P. 12(b)(6) when the plaintiffs failed to plead facts tending to show the third-party involvement required for a Section 8(b) claim. *Echevarria*, 256 F.3d at 626. There, the plaintiffs alleged that the Chicago Title and Trust Co. had overcharged them for the recording service, and then split this amount with the Cook County Recorder by paying the recorder its fee and pocketing the overage. *Id.* at 625. We held that Section 8(b) did not apply because the title company both collected and

retained fees from the plaintiffs in the same capacity. *Id.* We noted that if we subjected a settlement service provider to RESPA liability for keeping an overcharge without requiring an allegation that the unearned fee was shared with a third party, "we would radically, and wrongly, expand the class of cases to which RESPA applies." *Echevarria,* 256 F.3d at 627. Therefore, insofar as the Weizeoricks argue that liability attaches to AAMG under Section 8(b) simply for accepting an overcharge as part of a real estate settlement transaction, they are incorrect. A well-pleaded complaint based upon a violation of Section 8(b) must allege that the defendant shared an unearned fee with a third party to the real estate transaction. *Echevarria,*256 F.3d at 627. *See also, Boulware v. Crossland Mortgage Corp.*, 291 F.3d 261, 265 (4th Cir. 2002).[2]

In response, the Weizeoricks argue that even if they cannot succeed by merely challenging AAMG's receipt of an unearned fee, they have nonetheless alleged a fee split consistent with the statute. In support of this position the Weizeoricks direct our attention to a similar Section 8(b) case where a district court denied a motion to dismiss where the plaintiffs alleged a similarly atypical feesplit. *See Christakos v. Intercounty Title Co.*, 196 F.R.D. 496 (N.D. Ill. 2000). In

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[2] We also do not defer, as the Weizeoricks would have us, to the Department of Housing and Urban Development's (HUD) policy statement on this provision. *See Real Estate Settlement Procedures Act Statement of Policy* 2001-1, 66 Fed.Reg. 53052, 53057 (Oct. 18, 2001). We have previously declined to defer to HUD's interpretation of Section 8(b), since the statute is clear on its face and HUD's statement was adopted without any formal rule-making procedures. *Kzralic,* 314 F.3d at 881.

Christakos, the title company, Intercounty Title, was responsible for handling the paperwork associated with refinancing a home loan. *Id.* at 499-500. The bank holding the initial mortgage agreed to file the paperwork to release the mortgage, but Intercounty Title twice charged the plaintiff to have the mortgage released, once by the bank and once by Intercounty. *Id.* at 500. However, only the bank actually prepared and filed the release. The court found that the plaintiffs successfully alleged a split in violation of Section 8(b) because Intercounty shared the fee with a third party, the bank. *See id.* at 503. Specifically the court found that the two recording fee payments "were made from the same pool of funds from the loan proceeds over which [the title company], as settlement agent, had control" and from which it directed payments to be made. *Christakos,* 196 F.R.D. at 503. *Christakos* is not in conflict with *Echevarria,* in that the plaintiff alleged that the defendant in *Christakos* shared an unearned fee with a third party involved in the real estate transaction. Intercounty Title did not merely accept an unearned fee, but instead accepted fees for a single service, and split that fee with a third party, who then performed the service.

Against this backdrop we review the Weizeoricks' complaint. Significantly, the Weizeoricks allege that AAMG violated RESPA because they received a $10.00 fee to record the release of the Weizeoricks' mortgage, even though the release was recorded by the closing company, and the closing company received a separate fee for its services. For purposes of this 12(b)(6) determination, we need to examine the "Payoff Statement" and the "Settlement Statement"

referenced in the Weizeoricks' complaint.[3] This will bring into focus the exact nature of the alleged transaction between the Weizeoricks, the closing company and AAMG. According to the Settlement Statement, the Weizeoricks' return from the sale of their house was subject to several different reductions upon closing. First, the Weizeoricks were charged a "RELEASE FEE" of $25.60 as part of their $8063.00 in settlement charges. This group of charges was accepted by the closing company and was listed on the "Settlement Statement" as "Settlement charges to the seller." In addition, they were charged $92,483.12 as a "Payoff of first mortgage loan." This figure was supplied to the closing company by AAMG through a "Payoff Statement."[4] Included in this figure was a "Recording discharge/release of Lien Fee" of $10.00 as well as "Fax Fees" of $15.00. Thus, the Weizeoricks allege they were charged a total of $35.60, $10.00 paid to AAMG and $25.60 paid to the closing company, for the single service of recording the release of the lien on their title.

If we draw all reasonable inferences from these allegations in the Weizeoricks' favor, *Scott v. O'Grady,* 975 F.2d 366,

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[3] Fed. R. Civ. P. 10(c) provides "[a] copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes." *See also Rosenblum v. Travelbyus.com Ltd.*, 299 F.[3d] 657, 660 (7th Cir. 2002).

[4] The actual figure supplied to the title company by AAMG was $92,447.92, but with a provision that the amount would be adjusted by a per diem interest rate of $17.60. If we add two days of per diem interest added to the total supplied in the payoff statement, or $35.20, we arrive at the settlement statement's figure of $92,483.12.

368 (7th Cir. 1992), the Weizeoricks have successfully alleged a split of fees in violation of RESPA section 8(b). Unlike *Echevarria,* there are three parties to this real estate transaction: the Weizeoricks, AAMG and the closing company. We can reasonably infer from the complaint and attached documents that the closing company made the payment of the $10.00 for the recording of the release to AAMG from the pool of funds involved in the transaction. According to the documents, the closing company also made a payment to the Weizeoricks that represented their return on the sale of their house, less the closing company's recording fee. AAMG, therefore, allegedly received a $10.00 split of the recording fee from the closing company, even though they did not record the release. As AAMG notes, this case does differ slightly from *Christakos*. AAMG, the named defendant here, is the entity that received the unearned payment for allegedly performing no service. In *Christakos,* it was the closing company that had control over the funds and paid out the fee split. However, this is a distinction without a difference because the statute does not place liability on only the entity who pays out the alleged kickback, but instead places liability on both the giver and receiver of an unearned kickback.[5] Therefore, the defendant in a Section 8(b) cause of action need not be the party who had control over the split

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[5] "No person shall give *and no person shall accept* any portion, split, or percentage of any charge made or received for the rendering of a real estate settlement service ...." 12 U.S.C. § 2607(b). In addition to civil penalties, *RESPA* also establishes criminal sanctions for violations, including up to one year in prison. These penalties provide that both the giver and the acceptor of the unearned fees are jointly and severally liable. *See* 12 U.S.C. § 2607(d)(1)-(2).

fees, as long as a fee split is alleged. Nor does the statute require that the plaintiff allege that all of the parties involved in the fee splitting have knowledge of their participation in, or a conspiracy to join in, an illegal arrangement. *Christakos,* 196 F.R.D. at 503. The Weizeoricks' allegation could be interpreted in a way that AAMG is itself the third party involved in the fee split, because AAMG accepted an allegedly unearned portion of a recording fee from the title company, who also kept part of the charged fee and actually performed the service of recording the release. If this angle is pursued, the district court will need to sort out any facts that would substantiate such an interpretation.

Pursuant to Section 8(b), the Weizeoricks must also allege the fee was collected "other than for services actually performed." 12 U.S.C. § 2607(b). Because the Weizeoricks allege that the title company, and not AAMG, recorded the release of the lien, the $10.00 fee collected by AAMG may have been unearned and therefore their complaint satisfies the statutory requirement. However, on appeal, the Weizeoricks conceded that AAMG prepared and delivered the lien release to the title company. It is possible that AAMG's $10.00 fee was incurred for the preparation or delivery of the release. It is also possible that AAMG charged for that service elsewhere in the "Payoff Statement," for example as a "Fax Fee." Moreover it is not entirely clear, based on the settlement statement, that the Weizeoricks themselves paid for the entirety of the recording fees. The buyer of the house was also charged $71.00 in recording fees, according to the settlement statement, a charge which may have also included the release fee. Every real estate closing is a unique series of fees, payments and other monetary transactions between at least one lender, a buyer, a seller and a closing company

which raises numerous individualized questions just like these. However, those and any related questions are better answered through discovery, because if we confine our review to the complaint, the Weizeoricks have successfully alleged that a third party to their real estate transaction accepted a portion of a fee that was unearned in violation of 12 U.S.C. § 2607(b).

IV.

In conclusion we find that the district court erred in denying the Weizeoricks' RESPA claim based on the court's conclusion that the Weizeoricks failed to plead that AAMG controlled the settlement process and knew that the title company was recording the release of mortgage. Neither is an element of a claim under 12 U.S.C. § 2607(b). The dismissal of the Weizeoricks' RESPA claim with prejudice is therefore REVERSED and REMANDED for further proceedings.

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

No. 01 C 713

[Filed November 16, 2001]

Gregory & Margaret Weizeorick,)
and others similarly situated,)
Plaintiffs,)
)
v.)
)
ABN AMRO Mortgage Group, Inc.)
Defendant.)

Michael W. Dobbins
CLERK

Office of the Clerk

Mark A. Rabinowitz
Piper, Marbury, Rudnick & Wolfe
203 North LaSalle Street
Suite 1800
Chicago, IL 60601-1293

Case Number: 1:01-cv-00713

Title: Weizeorick v. ABN Amro Mtge Grp

Assigned Judge: Honorable William J. Hibbler

MINUTE ORDER of 11/16/01 by Hon. William J. Hibbler: For the attached reasons, the court grants defendant's motion to dismiss plaintiffs' RESPA claim and denies defendant's motion to dismiss the remaining claims [8-1]. Status hearing set for 12/5/01 at 9:15 a.m. (Entered Memorandum and Order). Mailed notice.

This docket entry was made by the Clerk on November 20, 2001

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

No. 01 C 713

[Filed November 16, 2001]

Gregory & Margaret Weizeorick, and others similarly situated, Plaintiffs,	)
v.	)
ABN AMRO Mortgage Group, Inc. Defendant.	)

Honorable William J. Hibbler

Defendant's Motion to Dismiss (#8-1)

DOCKET ENTRY:

For the attached reasons, the Court **GRANTS** Defendant's motion to dismiss Plaintiffs' RESPA claim and **DENIES** Defendant's motion to dismiss the remaining claims. Enter Memorandum and Order. Status hearing set for 12/5/01 at 9:15 a.m.

[For further detail see order attached to the original minute order.]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

No. 01 C 713

[Filed November 16, 2001]

Gregory & Margaret Weizeorick, and others similarly situated, Plaintiffs,	)
v.	)
ABN AMRO Mortgage Group, Inc. Defendant.	)

JUDGE WILLIAM J. HIBBLER

MEMORANDUM AND ORDER

The named homeowners and others similarly situated have brought suit against a mortgage company, the holder of Plaintiffs' prior mortgage, asserting claims for (1) violation of the Real Estate Settlement Procedures Act ("RESPA"), 12 U.S.C. § 2601, *et seq.*, (2) breach of contract, (3) restitution and (4) violation of the Illinois Consumer Fraud Act ("ICFA"), 815 ILCS 505/1, *et. seq.* Defendant moves to dismiss all counts of Plaintiffs' complaint for failure to state a claim upon which relief can be granted. For the following reasons, Defendant's motion to dismiss is GRANTED insofar as it asks the Court to dismiss Plaintiffs' RESPA claim. In all other respects, however, Defendant's motion is DENIED.

Facts

On July 24, 2000, Gregory and Margaret Weizeorick ("Plaintiffs") closed on the sale of their home. In connection with the closing and the repayment of their mortgage, ABN AMRO Mortgage Group, Inc. ("Defendant"), as the holder of Plaintiffs' mortgage, sent Plaintiffs a Payoff Statement on July 18, 2000, indicating their outstanding loan balance and detailing all other charges required to pay off the loan. The Payoff Statement included a $10 fee for the "Recording Discharge/Release of Lien Fee" in the amount owed by Plaintiffs. Plaintiffs paid off their mortgage loan, including the $10 recording fee. At closing, Plaintiffs were charged and paid $25.60 for the same service by their closing agent, who actually recorded the discharge/release of Plaintiffs' mortgage.

Plaintiffs subsequently filed a complaint against Defendant, alleging it had collected fees for services performed by another entity in violation of RESPA and ICFA, and asserting breach of contract and restitution claims. After Plaintiffs filed a motion for class certification, Defendant sent Plaintiffs a check to reimburse them for the $10 recording fee. At the presentment hearing on April 26, 2001, Plaintiffs withdrew their motion for class certification subject to Defendant's preclusion from filing an offer of judgment. (Minute Order 4/26/01.)

Standard of Review

The purpose of a Rule 12(b)(6) motion is to test the sufficiency of a complaint, not to decide the merits of the case. *Demitropoulos v. Bank One Milwaukee, N.A.*, 915 F.

Supp. 1399, 1406 (N.D. Ill. 1996). In considering the sufficiency of a complaint, all factual allegations stated in the document are accepted as true, and all reasonable inferences are drawn in favor of the plaintiff. *Murphy v. Walker,* 51 F.3d 714, 717 (7th Cir. 1995). This Court must sustain a complaint unless it appears beyond doubt the plaintiff can prove no set of facts consistent with the allegations that would entitle him to relief. *Conley v. Gibson,* 355 U.S. 41, 45-46 (1957).

Analysis

Plaintiffs' RESPA Claim

Count I of Plaintiffs' complaint alleges Defendant violated RESPA by unlawfully splitting fees with the title company that recorded the release of Plaintiffs' mortgage. 12 U.S.C. § 2607(b). Congress enacted RESPA to "prohibit all kickback and referral fee arrangements whereby any payment is made or 'thing of value' furnished for the referral of real estate settlement business." *Mercado v. Calumet Fed. Sav. & Loan Ass'n,* 763 F.2d 269, 270-71 (7th Cir. 1985) (quoting S.Rep. 93-866, 93d Cong., 2d Sess. (1974)). Consistent with this goal of preventing kickbacks, RESPA states "no person shall give and no person shall accept any portion split, or percentage of any charge made or received for the rendering of a real estate settlement service in connection with a transaction involving a federally related mortgage loan other than for services actually performed." 12 U.S.C. § 2607(b).

Here, both parties agree RESPA requires Plaintiffs to allege Defendant split fees with a third party; however, they disagree on what constitutes third party involvement under the

Act. The Seventh Circuit recently addressed this issue in *Echevarria v. Chicago Title & Trust Co.* 256 F.3d 623 (7th Cir. July 5, 2001). In *Echevarria,* homebuyers alleged the title company violated RESPA by unlawfully splitting fees with the County Recorder. Specifically, the plaintiffs alleged the $45 fee they paid to defendant was "illegally split when [the defendant] paid a third party, the County Recorder, a portion of the fees ... and retained the overcharges ... for itself." *Id.* at 626. The Seventh Circuit rejected the plaintiffs' argument, because RESPA required the plaintiffs to allege the defendant "shared an unearned fee with a third party" and the County Recorder did not constitute a third party for purposes of RESPA § 2607(b) since it did not accept a portion of defendant's unearned fees. *Id.* In doing so, it affirmed that unearned fees are not actionable under RESPA unless they are shared by at least two parties. *Id.*

The Court is unable to distinguish Plaintiffs' case from *Echevarria.* Like the plaintiffs in *Echevarria,* Plaintiffs here focus on the total $35.60 they paid to have their release recorded, and allege it was illegally split between the third party title company, which recorded the release and received $25.60, and Defendant, which received $10 of the $35.60. Similarly, Plaintiffs have failed to plead facts showing that Defendant illegally shared fees with the third party title company. Like the County Recorder in *Echevarria,* the title company received no more than its standard release recording fee and it did not give or arrange for Defendant to receive an unearned portion of these fees. *Id.* at 626. Because the title company had no involvement in the unearned $10 fee accepted by Defendant, it is not considered as a third party for purposes of RESPA § 8(b). *Id.* Therefore, Plaintiffs complaint fails to allege the type of third party involvement

necessary to state a claim under RESPA § 8(b). Because Plaintiffs failed to "accuse a third party of accepting unearned fees," they have not stated a claim under RESPA and Defendant's motion to dismiss is granted. *Id.* at 627; *see also Mercado,* 763 F.2d at 270-71.

Plaintiffs' Consumer Fraud Claim

The Illinois Consumer Fraud and Deceptive Business Practices Act ("ICFA") prohibits the "employment of any deception, fraud, false pretense, false promise, misrepresentation or the concealment, suppression, or omission of any material fact ... in the conduct of any trade or commerce." 815 ILCS § 505/2.

To state a cause of action under ICFA, a plaintiff must allege (1) defendant engaged in a deceptive act or practice; (2) defendant intended for the plaintiff to rely on the act or practice; (3) the act or practice occurred in the course of trade or commerce; and (4) the act or practice proximately caused the plaintiff's injury. *Christakos v. Intercounty Title Co.,* 196 F.R.D. 496, 503 (N.D. Ill. Aug. 25, 2000). ICFA claims are subject to the heightened pleading requirements of Federal Rules of Civil Procedure 9(b) which mandate for alleging fraud with particularity. *See Ackerman v. Northwestern Mut. Life Ins. Co.,* 172 F.3d 467, 469 (7th Cir.1999) (clarifying *Vicom, Inc. v. Harbridge Merch. Serv. Inc.,* 20 F.3d 771, 777 n.4 (7th Cir. 1994)). Federal Rule of Civil Procedure 9(b) mandates a plaintiff who alleges fraud or mistake to state with particularity the circumstances constituting fraud or mistake. Specifically, Rule 9(b) requires the plaintiff to specifically allege the who, what, where, and when of the alleged fraud. *Ackerman,* 172 F.3d at 469-70. The reason for

the heightened pleading requirement in such cases is to force the plaintiff to do more than the usual investigation before filing a complaint "to assure that the charge of fraud is responsible and supported, rather than defamatory and extortionate." *Id.*

> Greater precomplaint investigation is warranted in fraud cases because public charges of fraud can do great harm to the reputation of a business firm or other enterprise (or individual), because fraud is frequently charged irresponsibly by people who have suffered a loss and want to find someone to blame for it, and because charges of fraud ... frequently ask courts in effect to rewrite the parties' contract or otherwise disrupt established relationships.

Id. at 469 (citations omitted).

The Court finds Plaintiffs sufficiently state with particularity a cause of action under ICFA. First, Plaintiffs adequately pled a deceptive act or practice by Defendant. Specifically, Plaintiffs allege Defendant represented it was collecting a $10 recording fee in its Payoff Statement, and that this was false because Defendant never recorded the release. Second, Plaintiffs allege Defendant made this representation with the itent that Plaintiffs and other rely on it. They argue Defendant's intent can easily be inferred from the fact it automatically included the $10 recording fee in the amount Plaintiffs owed on their mortgage. Third, Plaintiffs allege the representations were made in the course of Defendant's mortgage lending business. Fourth, Plaintiffs allege Defendant's representation proximately caused their damages.

However, Defendant maintains Plaintiffs fail to state a claim under ICFA because the complaint did not allege facts demonstrating Defendant knowingly made false statements. Defendant argues when it issued the payoff statement on July 18, 2000, it did not know the title company would record the release and charge Plaintiffs a fee for doing so at the July 24, 2000 closing.

Plaintiffs deny Defendant's assertion and maintain Defendant knew or should have known that it would not ultimately record the release of Plaintiff's mortgage. Plaintiffs also point to Defendant's failure to return Plaintiffs' fee after it discovered the title company had recorded the release as further evidence of Defendant's misrepresentation and its intent for Plaintiffs to rely on its misrepresentation. Finally, Plaintiffs maintain Defendant deliberately charged Plaintiffs for a service it did not intend to perform or knew was unnecessary because the title company traditionally recorded such releases.

Whether Plaintiffs can establish Defendant knew or should have known it would not record the release of Plaintiffs' mortgage when it charged Plaintiffs the $10 fee is a question of fact to be addressed at a later stage of this proceeding. Plaintiffs' complaint contains sufficient averments about Defendant's knowledge and intent, and Plaintiff has pleaded successfully the ICFA violations at the heart of the complaint.

Further, Defendant argues Plaintiffs' ICFA claim fails because it is at most an ordinary breach of contract action. Courts have repeatedly resisted attempts by plaintiffs to plead ordinary breach of contract claims as causes of action under the ICFA. *Golembiewski v. Hallberg Ins. Agency,* 635

N.E.2d 452, 460 (1st Dist. 1994). "Every individual breach of contract between two parties...does not amount to a cause of action cognizable under the (ICFA)... If the (ICFA) did apply, then common law breach of contract actions 'would be supplemented in every case with an additional and redundant remedy'" *Id.* at 121 (quoting *Exchange Nat'l Bank v. Farm Bureau Life Ins. Co,* 438 N.E.2d 1247, 1250 (Ill. 1982)). However, even if the face of Plaintiffs' complaint alleges a standard breach of contract claim, the Court may find it sufficient to state a cause of action under ICFA if Defendant's alleged misconduct implicates consumer protection concerns. Scarsdale Builders, Inc. V. Ryland Group, Inc., 911 F.Supp. 337 (N.D. Ill 1996). "[W]here a plaintiff attempts to allege a violation of the Act in a case which appears on its face to involve only a breach of contract, the relevant inquiry is whether the alleged conduct implicates consumer protection concerns." *Id.* at 340 (quoting *Downers Grove Volkswagen, Inc. v. Wigglesworth Imports, Inc.,* 546 N.E.2d 33, 41 (Ill.App.Ct. 1989)). Here, Plaintiffs suggest consumer protection concerns are at issue, as Plaintiffs allege "by including the $10 charge in its payoff statements, Defendant is collecting funds that it knows borrowers have no choice but to pay because the title company will not allow the closing to proceed unless the borrower remits the entire payoff amount to the mortgage company." (Pls. Resp. Mot. Dismiss at 6.) Therefore, while not every unfulfilled contract promise constitutes a violation of ICFA, Plaintiffs' complaint alleges conduct within the Act's coverage.

Plaintiffs' Breach of Contract and Restitution Claims

Count II of Plaintiffs' complaint alleges Defendant breached its contract with Plaintiffs by failing to record the

release of their mortgage. In Count III, Plaintiffs allege the related claim that they are entitled to restitution of the $10 fee. To state a cause of action for breach of contract, a plaintiff must allege (1) the existence of a valid and enforceable contract; (2) the performance of the contract by the plaintiff; (3) breach of the contract by the defendant; and (4) a resulting injury to plaintiff. *Hickox v. Bell,* 552 N.E.2d 1133, 1143 (Ill.App.Ct. 1990).

Here, Plaintiffs have adequately pleaded the elements of a breach of contract claim. First, Plaintiffs' complaint includes a copy of the Payoff Statement issued by Defendant and alleges it contained a promise to record the discharge/release of Plaintiffs' mortgage in exchange for Plaintiffs' payment of $10. Second, Plaintiffs' complaint includes a Settlement Statement demonstrating that Plaintiffs paid off their mortgage, including the $10 recording fee. Third, Plaintiffs allege and Defendant concedes that Defendant did not record the release of Plaintiffs' mortgage. Fourth, Plaintiffs allege damages caused by Defendant's breach.

Defendant maintains Plaintiffs' breach of contract claim fails because "Defendant's Payoff Statement does not contain a promise to record the release, but merely states that, if plaintiffs request, [Defendant] would charge $10 to do so." (Mot. Dismiss at ¶6.) However, even if Defendant's interpretation of its duties could be reasonably inferred from the Payoff Statement, at this stage the Court must draw all reasonable inferences in Plaintiffs' favor and accept all well-pleaded factual allegations in the complaint as true. Here, the terms of the Payoff Statement are consistent with Plaintiffs' allegations that Defendant had a duty to record the

discharge/release of their mortgage, and failure to do so constituted a breach of the agreement. Therefore, because Plaintiffs have sufficiently pleaded the elements of a breach of contract claim, Defendant's motion to dismiss Count II is denied.

Further, the Court finds Defendant's argument for mootness similarly unpersuasive. After Plaintiffs filed this complaint and moved for class certification, Defendant mailed the named Plaintiffs a check for their $10 fee and thus, according to Defendant, their breach of contract and restitution claims are moot. The Court addressed this issue at the presentment hearing on this motion when it stated "Plaintiff's motion for class certification is withdrawn in open court without prejudice with leave to refile[,] subject to Defendant being precluded to filing an offer of judgment." (Minute Order April 26, 2001.) Thus, Defendant is prohibited from the "tactic" of using a Federal Rule of Civil Procedure 68 offer of judgment to buy off the named plaintiff prior to the time the Court addresses class certification. *Greisz v. Household Bank,* 176 F.3d 1012, 1015 (7th Cir. 1999). The certification of a class operates as a material change in the nature of the litigation which extinguishes a pending Rule 68 offer of judgment against a single plaintiff. As the Seventh Circuit observed, "an offer to one is not an offer of the entire relief sought by the suit." *Id.* Here, Defendant attempts unsuccessfully to reinterpret the Court's above order and to distinguish its effectiveness between individual and class claims. However, Defendant is not permitted to try to warp the valuable purpose of Rule 68 offers of judgment: to serve as a means of facilitating and encouraging settlements, rather than as a tactical device to gain an advantage by racing to the courthouse. *See Asch v. Teller, Levit & Silvertrust,* 200

F.R.D. 399, 400+ (N.D. Ill. 2000). The Court will hold Defendant to both the letter and spirit of its order and the law. *See generally Greisz,* 176 F.3d at 1014-15; *Holstein v. City of Chicago,* 29 F.3d 1145, 1147 (7th Cir. 1994); *Kremnitzer v. Cabrera & Rephen,* 202 F.R.D. 239, 242 (N.D. Ill. 2001); *Janikowski v. Lynch Ford, Inc.,* No. 98 C 8111, 1999 WL 608714 (N.D.III. Aug. 5, 1999), *aff'd on other grounds,* 210 F.3d 765 (7th Cir. 2000); *Gibson v. Aman Collection Serv., Inc.,* No. IP 00-17908-C T/G, 2001 WL 849525, at *1 (S.D.Ind. May 23, 2001).

CONCLUSION

For the above reasons, Defendant's Motion to Dismiss is GRANTED in part and DENIED in part

IT IS SO ORDERED.

DATED: November 16, 2001

/s/_____
WILLIAM J. HIBBLER,
DISTRICT JUDGE

No. 03-859

Supreme Court, U.S.
FILED
JAN 12 2004
OFFICE OF THE CLERK

In The
Supreme Court of the United States

ABN AMRO Mortgage Group, Inc.,
a Delaware corporation,

Petitioner,

v.

GREGORY & MARGARET WEIZEORICK,
Individually, and on behalf of all others similarly situated,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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COUNTER-STATEMENT OF QUESTION PRESENTED

Whether the Court of Appeals correctly found that the complaint in this case, which pleads that the defendant violated § 2607(b) of the Real Estate Settlement Procedures Act, 12 U.S.C. § 2607(b), states a claim under the notice pleading requirements of the Federal Rules of Civil Procedure.

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STATEMENT OF THE CASE

The Petitioner, ABN AMRO Mortgage Group, Inc., seeks this Court's review based on a non-issue. ABN claims that the Seventh Circuit's decision – which reversed the district court's holding that the Respondents' complaint failed to state a claim under Fed. R. Civ. P. 12(b)(6) – was error because in the course of its opinion the Seventh Circuit stated that knowledge is not an element of a claim under § 2607(b) of the Real Estate Settlement Procedures Act, 12 U.S.C. § 2601, *et seq*. This is a non-issue because, at the pleading stage, a plaintiff is not required to plead every element of the cause of action in order to state a claim. It is also a non-issue because ABN concedes in the Petition that knowledge is not an element of a claim under § 2607(b) of RESPA. ABN's claim that the Seventh Circuit's statement was inconsistent with the plain language of § 2607(b) of RESPA and its earlier decisions is also false. ABN cites not one case – let alone a case from this Court, the Seventh Circuit or any other Court of Appeals, or a state court of last resort, that has taken a contrary view.

Section 2607(b) of RESPA prohibits settlement service providers from paying or receiving an unearned portion of a fee collected for settlement services. *See* 12 U.S.C. § 2607(b). *Christakos v. Intercounty Title Co.* held that the plain language of this provision applied to a situation in which the unearned portion of the total fee charged for a settlement service was, in form, listed as a separate charge on the settlement statement generated in connection with the real estate closing. *See Christakos*, 196 F.R.D. 496, 503 (N.D. Ill. 2000). The *Christakos* decision is supported by the companion regulation to § 2607(b), which provides that the charging of a duplicative unearned fee

for a settlement service violates § 2607(b) of the RESPA. *See* 24 C.F.R. § 3500.14(c) ("[a] charge by a person for which no or nominal services are performed or for which *duplicative fees are charged* is an unearned fee and violates this section.") (emphasis added).

The Seventh Circuit approved the reasoning of *Christakos* in *Echevarria v. Chicago Title & Trust Co.*, stating that "[the plaintiffs in *Christakos*] successfully marshaled evidence showing a 'split.'" *See Echevarria*, 256 F.3d 623, 626-27 (7th Cir. 2001). ABN never claimed that *Christakos* was incorrectly decided.

The Weizeoricks' complaint presents a fact pattern materially identical to *Christakos*. They allege that in connection with the closing on the sale of their home, ABN collected $10 from the Weizeoricks to record the release of ABN's mortgage lien at the same time that the title company collected $25.60 from them to record the release, that the title company actually performed the recording service, that ABN did not, and that as a result the $10 portion ABN received of the $35.60 in recording charges the Weizeoricks' paid was unearned. *See* Cmplt. below at App. 1-3.

Despite this, the district court found that the Weizeoricks' complaint failed to state a claim. However, the district court's opinion did not discuss *Christakos* or its reasoning. The Weizeoricks appealed and the Seventh Circuit – reaffirming that *Christakos* accurately states the law – concluded that the Weizeoricks had stated a claim under § 2607(b) of RESPA. ABN asked for an *en banc* review of the decision based on the same arguments it makes here, but no judge requested a vote on the matter. *See* Petition at p. 2a.

ABN's Petition is not based on the substance of the Seventh Circuit's decision. Again, ABN does not take issue with the reasoning of *Christakos* or the Seventh Circuit's approval of that decision. Instead, ABN has seized on the Seventh Circuit's statement that knowledge is not an element of a claim under § 2607(b) of RESPA. However, as noted above, this is a non-issue because the Weizeoricks are not required – at the pleading stage – to allege that ABN knowingly collected an unearned split of a fee for settlement services, ABN concedes on page 10 of the Petition that knowledge is not an element of a claim under § 2607(b) of RESPA, and the Seventh Circuit's remark is consistent with the plain language of the statute and its earlier decisions, notwithstanding ABN's claims to the contrary. ABN cites to no split in authority on this issue among the decisions of this Court, the Courts of Appeals, and the state courts of last resort, nor does ABN point to any other reason why this case, which, again, is at the pleading stage, merits review by this Court. The Petition should be denied.

REASONS FOR DENYING THE PETITION

A. This Case Does Not Meet Any of the Criteria for Review Under Supreme Court Rule 10.

Supreme Court Rule 10 states that this Court only grants review "for compelling reasons", which generally means that the case in question meets one of the following criteria:

> (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the

> same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;
>
> (b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;
>
> (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

Sup. Ct. R. 10. ABN offers nothing to show that the Seventh Circuit's conclusion that the Weizeoricks' complaint states a claim under Fed. R. Civ. P. 12(b)(6) meets any of these criteria. They point to no conflict between the Courts of Appeals, the state courts of last resort or a state court of last resort and this Court, or any extraordinary deviation from the usual course of judicial proceedings. Indeed, the Petition cites no decision of this Court, no decision of a state court of last resort, and no Court of Appeals' decision outside of the Seventh Circuit. ABN only offers its *ipse dixit* that this case merits this Court's review.

B. There Is No Basis for Review Even if Knowledge Is an Element of a Claim Under § 2607(b) of RESPA.

ABN's petition is based on its belief that the Seventh Circuit erred in stating that knowledge is not an element of a claim under § 2607(b) of RESPA. The posture of this case is that the Seventh Circuit has reversed the district court's dismissal of the Weizeoricks' complaint for failure to state a claim under Fed. R. Civ. P. 12(b)(6). Even if knowledge were an element of a claim under § 2607(b) of RESPA, that would not be outcome-determinative at this stage because the Weizeoricks did not need to plead knowledge to defeat ABN's motion to dismiss.

Under federal notice pleading requirements, a plaintiff need not plead every element of a cause of action to state a claim. *See, e.g., Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 511 (2002) ("under a notice pleading system, it is not appropriate to require a plaintiff to plead facts establishing a prima facie case . . . "). "[A]ll the Rules require is 'a short and plain statement of the claim' that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993), *quoting, Conley v. Gibson*, 355 U.S. 41, 47 (1957). ABN does not claim that it lacked fair notice of the Weizeoricks' RESPA claim or the bases for that claim.

Further, even if the Weizeoricks needed to plead knowledge, the reasonable inferences to be drawn from their complaint satisfied that alleged need. The Weizeoricks pled that the title company and not ABN recorded ABN's release of its mortgage lien (*see* below at App. 3, ¶ 7), and therefore ABN must have sent the title company the release to be recorded. Thus, ABN knew the title company was going

to record the release, and that the title company would collect money from the Weizeoricks to recover the cost of doing so. Because ABN knew these facts, it also knew that it was not going to record the release itself, and that it did not earn the part of the money paid for recording the release that it received.

When ABN sent the release to the title company for recording, it could have returned the unearned part of the money paid for recording services that it received to the Weizeoricks, or paid it to the title company. But it did not return the money or pay it to the title company, despite having six months between the closing in July, 2000 and the filing of the lawsuit in February, 2001 to do so. *See* below at App. 2, ¶ 5, and at App. 7.

ABN disputes that it had knowledge, but there is no basis for its claim at this stage. There is nothing in the complaint from which the district court or the Seventh Circuit could have concluded that ABN lacked knowledge as a matter of law. None of the fact allegations ABN presents in its Petition regarding its knowledge are part of the Weizeoricks' complaint – they are unsupported fact assertions outside of the complaint that ABN has improperly interjected into the proceedings, which may not be considered in connection with a Fed. R. Civ. P. 12(b)(6) motion.[1] There is no purpose in reviewing a decision

[1] ABN's improper fact allegations regarding its alleged lack of knowledge include that it allegedly did not know "that the Weizeoricks intended to pay off the loan through a sale of the real estate securing the loan", "that the Weizeoricks' purchasers intended to finance their purchase of that real estate through the closing of a federally related mortgage transaction", that "the Weizeoricks closed the federally related mortgage transaction in connection with the sale of the real

(Continued on following page)

sustaining a complaint under Fed. R. Civ. P. 12(b)(6) based on fact allegations outside the four-corners of the complaint.

C. The Seventh Circuit's Decision Did Not Expand Liability Under § 2607(b) of RESPA or Conflict with Its Earlier Decisions.

The Seventh Circuit's statement that knowledge is not an element of a claim under § 2607(b) does not expand the scope of that statute because there is no basis in the first instance for concluding that § 2607(b) requires proof of knowledge. The plain language of the statute and its companion regulation say nothing about a knowledge requirement. *See* 12 U.S.C. § 2607(b); 24 C.F.R. § 3500.14(c). In fact, ABN concedes in the Petition that knowledge is not an element of a claim under § 2607(b) of RESPA. *See* Petition at p. 10 ("[c]ontrol over the closing and knowledge of duplicative fee collection, while not separate elements of a RESPA claim . . . ")

ABN's claim that the Seventh Circuit's decision conflicts with its earlier decisions – which is not a basis for review under Supreme Court Rule 10 – is also false. The Seventh Circuit has never held that illegal fee-splits under

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estate which secured AAMG's prior mortgage" that "a fee for recording the discharge/release of mortgage was made by the . . . closing agent in the amount of $25.60 ***in addition to the $10.00 fee for the same service that was included in the Payoff Statement issued by AAMG two weeks earlier***", that "its loan would be paid off through the proceeds of a federally related mortgage transaction" and that it intended to perform the recording services. ABN also makes the unsupported, and false, allegation that the title company was the Weizeoricks' agent at the closing.

§ 2607(b) must be knowing to be actionable, and none of the Seventh Circuit cases ABN cites hold that knowledge is required. In fact, contrary to ABN's claim that the Seventh Circuit's decision conflicts with its earlier decisions, the Seventh Circuit's decision is consistent with its earlier holding – in *United States v. Gannon* – that § 2607(b) does not require proof of knowledge. *See Gannon*, 684 F.2d 433, 440 (7th Cir. 1981). ABN cites no case, let alone a decision of this Court, one of the Courts of Appeals or a state court of last resort, that holds that § 2607(b) of RESPA contains a knowledge requirement.[2]

CONCLUSION

The Seventh Circuit's statement that § 2607(b) does not contain a knowledge requirement meets none of the criteria for review under Supreme Court Rule 10, review would not be warranted even if knowledge was an element of the claim because the Weizeoricks are not obligated to allege knowledge at the pleading stage, the Seventh Circuit's decision does not expand the scope of liability under § 2607(b) or conflict with its earlier decisions because neither the plain language of the statute nor the Seventh Circuit's other cases provide any basis for concluding that

[2] The cases ABN cites, erroneously, for the proposition that § 2607(b) of RESPA has a knowledge element are *Barbosa v. Target Mortgage Corp.*, 968 F.Supp. 1548 (S.D. Fla. 1997); *Campbell v. Machias Sav. Bank*, 865 F.Supp. 26 (D. Me. 1994); *Christakos*, 196 F.R.D. 496; *Duggan v. Independent Mortgage Corp.*, 670 F.Supp. 652 (E.D. Va. 1987); *Durr v. Intercounty Title Co.*, 14 F.3d 1183 (7th Cir. 1994); and *Echevarria v. Chicago Title & Trust Co.*, 256 F.3d 623 (7th Cir. 2001).

§ 2607(b) requires proof of knowledge, and ABN has conceded that knowledge is not an element of a claim under § 2607(b) of RESPA. ABN's Petition should be denied.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Gregory and Margaret Weizeorick, individually, and on behalf of all others similarly situated,	)	No. 01 C 713
Plaintiffs,	)	
v.	)	
ABN AMRO Mortgage Group, Inc., a Delaware corporation,	)	
Defendant.	)	

CLASS ACTION COMPLAINT

Plaintiffs, Gregory and Margaret Weizeorick, individually and on behalf of all others similarly situated, bring this action under the Real Estate Settlement Procedures Act, 12 U.S.C. § 2601, *et seq.* ("RESPA"), the Illinois Consumer Fraud Act, 815 ILCS 505/1, *et seq.* ("ICFA") and Illinois common law, to recover an unauthorized fee Defendant charged Plaintiffs and others in connection with the payoff of their mortgage, and allege:

JURISDICTION AND VENUE

1. The jurisdiction of the Court is invoked for the federal law claim as authorized by § 2614 of the RESPA and 28 U.S.C. § 1331, and for the state law claims as authorized by 28 U.S.C. § 1367.

2. Venue is proper in this district because the acts and transactions occurred here, Plaintiffs reside here, and Defendant transacts business here.

PARTIES

3. Plaintiffs, Gregory and Margaret Weizeorick, are citizens of the State of Illinois residing in the Northern District of Illinois. The loan described below is a "federally related mortgage loan" as defined by § 2602(1) of the RESPA. The charge described below was made or received for the rendering of a "settlement service" as defined by § 2602(3) of the RESPA.

4. Defendant, ABN AMRO Mortgage Group, Inc., is a Delaware corporation that owns and services residential mortgage loans in the ordinary course of its business. LaSalle Talman Bank, FSB, acquired Plaintiffs' mortgage loan from their original lender, Edgemark Mortgage Corporation, on October 22, 1993. Defendant subsequently acquired LaSalle Talman Bank, FSB and thereby acquired Plaintiffs' mortgage loan and/or the servicing rights to the same.

FACT ALLEGATIONS

5. On July 24, 2000, Plaintiffs closed on the sale of their home. In connection with the closing, Defendant gave Plaintiffs a "payoff statement" that indicated that to pay off their loan Plaintiffs would have to pay Defendant a $10 "RECORDING DISCHARGE/RELEASE OF LIEN FEE", in addition to the remaining principal and interest they owed. *See*, Payoff Statement, attached as Exhibit *A*.

6. Plaintiffs paid off their loan, including the $10 recording charge. *See*, Settlement Statement, attached as Exhibit *B*, at Line 504.

7. Defendant did not record the discharge/release of Plaintiffs' mortgage — the closing agent did, it charged Plaintiffs $25.60 for this service, and Plaintiffs paid it. *See*, Settlement Statement at Line 1114, attached as Exhibit *B*.

COUNT I
Violation Of The RESPA's Prohibition Against Unearned Fees

8. Plaintiffs adopt and reallege the allegations in ¶¶ 1-7.

9. The RESPA prohibits any person from collecting a fee to be given to another "for which no or nominal services are performed or for which duplicative fees are charged for mortgage related services if they did not perform any services." 12 U.S.C. § 2607(b) and Reg. X, 24 C.F.R. § 3500.14(c).

10. Plaintiffs paid a total of $35.60 for recording the discharge/release of their mortgage. Defendant violated the RESPA by receiving $10 of that amount because Defendant did not record any discharge/release of Plaintiffs' mortgage.

11. Defendant's violation of the RESPA renders it liable to Plaintiffs for three times the amount of the fee, costs and attorneys' fees. 12 U.S.C. § 2607(d)(2).

COUNT II
Breach of Contract

12. Plaintiffs adopt and reallege the allegations in ¶¶ 1-7.

13. Defendant charged Plaintiffs $10 to putatively record the discharge/release of their mortgage. Defendant never did so, thereby breaching its contract with Plaintiff.

14. Defendant's breach renders it liable to Plaintiffs for actual damages.

COUNT III
Restitution

15. Plaintiffs adopt and reallege the allegations in ¶¶ 1-7.

16. Plaintiffs paid Defendant a recording of discharge/release fee under the mistaken belief that Defendant would actually record the discharge/release of Plaintiffs' mortgage in exchange for the fee.

17. Defendant did not record the discharge/release of Plaintiffs' mortgage. Accordingly, Defendant cannot be allowed to retain the fee in equity and good conscience.

18. Defendant is liable to Plaintiffs for the amount of the fee.

COUNT IV
Violation Of The Illinois Consumer Fraud Act

19. Plaintiffs adopt and reallege the allegations in ¶¶ 1-7.

20. The Illinois Consumer Fraud Act prohibits any person from making any false, deceptive or misleading representation or omission, with intent that others rely on it, in trade or commerce. 815 ILCS 505/2.

21. Defendant misrepresented that it was collecting the $10 fee for recording the discharge/release of Plaintiffs' mortgage. Defendant did not record the discharge/release of Plaintiffs' mortgage.

22. Defendant made this misrepresentation with intent that Plaintiffs rely on it.

23. Defendant made this misrepresentation in the course of its business, *i.e.* in the course of trade or commerce.

24. Defendant's violation of the Illinois Consumer Fraud Act renders it liable to Plaintiffs for actual damages, costs and attorneys' fees. 815 ILCS 505/10a.

CLASS ALLEGATIONS

25. Plaintiffs bring this action individually and as a class action on behalf of all consumers similarly situated to Plaintiffs from whom Defendant collected a "RECORDING DISCHARGE/RELEASE OF LIEN FEE" at any time during the applicable statute of limitations period for each of the claims described above.

26. The Class consists of more than 50 people similarly situated to Plaintiffs from whom Defendant collected the "RECORDING DISCHARGE/RELEASE OF LIEN FEE" Defendant charged Plaintiffs.

27. Plaintiffs' claims are typical of the claims of the Class. Common questions of law or fact raised by this class

action complaint affect all members of the Class and predominate over any individual issues. Common relief is therefore sought on behalf of all members of the Class. A class action is superior to other available methods for the fair and efficient adjudication of this controversy.

28. The prosecution of separate actions by individual members of the Class would create a risk of inconsistent or varying adjudications with respect to the individual members of the Class, and a risk that any adjudications with respect to individual members of the Class would, as a practical matter, either be dispositive of the interests of other members of the Class not party to the adjudication, or substantially impair or impede their ability to protect their interests.

29. Plaintiffs will fairly and adequately protect and represent the interests of the Class. The management of the class action proposed is not extraordinarily difficult, and the factual and legal issues raised by this class action complaint will not require extended contact with the members of the Class because Defendant's conduct was perpetrated on all members of the Class, and will be established by common proof. Moreover, Plaintiffs have retained counsel experienced in class action litigation.

PRAYER FOR RELIEF

Plaintiffs, Gregory and Margaret Weizeorick, pray that this Court:

1. Certify the Class described above;

2. Appoint Plaintiffs as Class representatives of the Class, and their attorneys as Class Counsel for the Class;

3. Enter judgment in favor of Plaintiffs and the Class, and against Defendant, for damages, expenses and attorneys' fees as described above; and

4. Grant such further relief as deemed just.

Gregory and Margaret Weizeorick,

/s/ Michael Hilicki
One of Plaintiffs' Attorneys

Dated: February 1, 2001

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Michael S. Hilicki
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(312) 939-6280

David J. Philipps
Mary E. Philipps
Gomolinski & Philipps, Ltd.
8855 South Roberts Road
Hickory Hills, Illinois 60457
(708) 974-2900

EXHIBIT A

PAYOFF STATEMENT	DATE: July 18, 2000 **REVISED**
TO: Atty Gomolinski & Philipps Attn: Dawn Fax 708-974-2907	LOAN NO: 0003880168 LOAN TYPE: Conventional HAZARD PAID: $ .00 TAXES PAID: $ 1,108.93

NAME:
Gregory F Weizeorick
Margaret A Weizeorick
5612 S Neenah Ave
Chicago, IL 60638-0000

PRINCIPAL BALANCE AS OF July 18, 2000	$	93,457.63
INTEREST DUE AT 6.87500% FROM July 01, 2000 to July 24, 2000 PER DIEM .....$ 17.60	$	404.87
UNPAID LATE CHARGES	$	.00
RECORDING DISCHARGE/RELEASE OF LIEN FEE	$	10.00
TRUSTEE FEES	$	.00
TOTAL CHARGES DUE	$	10.00
LESS CURRENT ESCROW BALANCE	$	-1,439.58
TOTAL AMOUNT TO PAY LOAN IN FULL..	$	92,432.92
FAX FEES	$	15.00
UNPAID NSF CHARGES	$	.00
ADJUSTED TOTAL	$	92,447.92

*SEE REVERSE SIDE FOR IMPORTANT INFORMATION OR FOR TAX TRANSMITTALS PLEASE SEE ATTACHED.

PROPERTY ADDRESS:
5612 S Neenah Ave
Chicago IL 60638

PAYOFF DEPARTMENT

XP001-071/P58

IMPORTANT NOTICE
THE PAYOFF FUNDS MUST ONLY BE MAILED OR DELIVERED TO THE CASHIERING DEPARTMENT AT
4242 N. HARLEM AVE.
NORRIDGE, IL 60706

Important Information
About Your Payoff

ABN AMRO Mortgage Group, Inc.
2500 West Big Beaver Road
Troy, Michigan 48084
800/805-0070

Affiliates:
Standard Federal Bank
LaSalle Bank
LaSalle Home Mortgage

Please be advised that all payoff checks need to be made payable to "ABN AMRO Mortgage Group, Inc." who is the servicer of this loan. "ABN AMRO Mortgage Group, Inc." will also arrange to have the appropriate satisfaction document prepared under the name of the originating mortgagee of record.

All Payoff Checks Must Be Mailed Or Delivered To:

ABN AMRO Mortgage Group, Inc.
4242 North Harlem Avenue
Norridge, Illinois 60706

Issuance of this statement does not suspend the contractual requirement to remit monthly payments as they become due. A late charge will be addressed 15 days after a current payment is past due and should be added to the payoff total if applicable.

If the escrow balance is being credited to the payoff balance, we will not pay any taxes or property related insurance while this statement is in effect without specific written instructions from the mortgagor. As such, any accrual of real estate taxes and associated penalties, or

loss incurred as a result of a lapse in insurance coverage due to nonpayment, will be the responsibility of the mortgagor.

If you have an automatic payment drafting account, your next payment will be deducted unless we are notified in writing ten (10) business days prior to the draft date. You may cancel your account by calling 800-783-8900.

If there is a change in the mailing address, please advise us at the time of final payoff so discharge papers will be sent to the correct address. If we are not notified of a mailing change, all cancelled papers will be mailed to the last known mailing address.

This is a tentative statement and is subject to audit. These figures will be adjusted if any check/draft previously received and applied to the account is returned by the institution upon which it is drawn.

This statement will expire in 30 days. All figures must be verified prior to closing or the disbursement of closing funds.

Payoff Wire instructions On line member of Federal Reserve.

To have the payoff credited on the day of payment, the wire transfer must be received by ABN AMRO Mortgage Group, Inc. by 12:00 noon (central time zone). You must include the following information:

ABA# 071000505
Account Number: 03-804774-1
Customer's Name
Mortgage Loan Number
Attn: Payoff Department

IMPORTANT NOTICE
THE PAYOFF FUNDS MUST ONLY BE MAILED OR DELIVERED TO THE CASHIERING DEPARTMENT AT
4242 N. HARLEM AVE.
NORRIDGE, IL 60706

Form Approved OMB NO. 2502-0265 (Rev. 5-87)

A. U.S. Department of Housing and Urban Development
SETTLEMENT STATEMENT
ATTORNEYS' TITLE GUARANTY FUND, INC.
Second Floor
33 North Dearborn
Chicago, IL 60602-3100
(2) 372-8361
Taxpayer I.D. No.: 37-1222620
P.O. Box 9136
2408 Windsor Place
Champaign, IL 61821
1-800-252-0402

B. TYPE OF LOAN : RESPA BY: PD

FAC NO.: 1169688T CLOSER: MARIANNE SCHINDLER

6. FILE NO. : 10261103 | 7. LOAN NO. :

8. MORTGAGE INS. CASE NO. :
MEMBER : William E. Gomolinski #2404

C. NOTE: This form is furnished to give you a statement of actual settlement costs. Amounts paid to and by the settlement agent are shown. Items marked '(p.o.c)' were paid outside the closing; they are shown here for informational purposes and are not included in the totals.

D. NAME OF BORROWER : ULYSSES BANUELOS, NANCY QUINTERO
ADDRESS : 3904 W. 66TH, CHICAGO, IL 60629

E. NAME OF SELLER(S): GREGORY WEIZEORICK, MARGRET WEIZEORICK
CURRENT ADDRESS : 6612 S. KEENAN, CHICAGO, IL 60638
FORWARDING ADDRESS :
TAXPAYER I.D. NO(s): _____ _____

F. NAME OF LENDER : HARRIS TRUST & SAVINGS BANK
ADDRESS : 111 W. MONROE STREET STE 23W, CHICAGO, IL 60606

G. PROPERTY LOCATION : 6612 S. KEENAN, CHICAGO, IL 60638
PRINCIPAL RESIDENCE OF SELLER [Y/N]: ADDITIONAL CONSIDERATION [Y/N]:

H. SETTLEMENT AGENT : ATTORNEYS' TITLE GUARANTY FUND, INC.
PLACE OF SETTLEMENT : 8855 South Roberts Road, Hickory Hills 60457 ST: IL ZIP: 60457

I. SETTLEMENT DATE : 07/24/00 TIME : 12:00

J. SUMMARY OF BORROWER TRANSACTIONS :		K. SUMMARY OF SELLER TRANSACTIONS	
100. GROSS AMOUNT DUE FROM BORROWER		400. GROSS AMOUNT DUE TO SELLER	
101. Contract sales price	168000.00	401. Contract sales price	168000.00
102. Personal property		402. Personal property	
103. Settlement chgs. to borrower (ln.1400)	2772.76	403.	
104.		404.	
		405.	
Adjustments for items paid by seller in advance		Adjustments for items paid by seller in advance	
106. City/town taxes / / to / /		406. City/town taxes / / to / /	
107. County taxes / / to / /		407. County taxes / / to / /	
108. Assessments / / to / /		408. Assessments / / to / /	
109.		409.	
110.		410.	
111.		411.	
112.		412.	
120. GROSS AMOUNT DUE FROM BORROWER	170772.76	420. GROSS AMOUNT DUE TO SELLER	168000.00
200. AMOUNTS PAID BY OR IN BEHALF OF BORROWER		500. REDUCTIONS IN AMOUNT DUE TO SELLER	
201. Deposit or earnest money	2000.00	501. Excess deposit (see instructions)	
202. Principal amount of new loan(s)	103000.00	502. Settlement charges to seller (1400)	8063.00
203. Existing loan(s) taken subject to		503. Existing loan(s) taken subject to	
204. Dep. w/lend		504. Payoff of first mortgage loan	92483.12
205. LOCK IN DEPOSIT	1600.00	505. Payoff of second mortgage loan	
206.		506. Deposit or earnest money	2000.00
207.		507. POSSESSION ESCROW	3500.00
208.		508. ESCROW	1000.00
209.		509.	
Adjustments for items unpaid by seller		Adjustments for items unpaid by seller	
210. City/town taxes 07/01/99 to 12/31/99	1219.82	510. City/town taxes 07/01/99 to 12/31/99	1219.82
211. County taxes 01/01/00 to 07/24/00	1310.72	511. County taxes 01/01/00 to 07/24/00	1310.72
212. Assessments / / to / /		512. Assessments / / to / /	
213.		513.	
214.		514.	
215.		515.	
216.		516.	
217.		517.	
218.		518.	
		519.	
TOTAL PAID BY/FOR BORROWER	159030.54	520. TOTAL REDUCTION AMOUNT DUE SELLER	109576.66
300. CASH AT SETTLEMENT FROM OR TO BORROWER		600. CASH AT SETTLEMENT TO OR FROM SELLER	
301. Gross amt. due from borrower (ln.120)	170772.76	601. Gross amount due to seller (ln. 420)	168000.00
302. Less amt. pd. by/for borrower (ln.220)	159030.54	602. Less reduction amt. due seller (1.520)	109576.66
303. CASH ([X] FROM) ([ ] TO) BORROWER	11742.22	603. CASH ([X] TO) ([ ] FROM) SELLER	58423.34

App. 12

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EXHIBIT B

L. SETTLEMENT CHARGES			PAID FROM BORROWER FUNDS AT SETTLEMENT	PAID FROM SELLER FUNDS AT SETTLEMENT
700. TOT. SALES/BKR COM. based on price $ 168000.00 at % -				
Division of commission (Ln.700) as follows:				
701. $ to			XXXXXXXXXXXXXX	XXXXXXXXXXXXX
702. $ to			XXXXXXXXXXXXXX	XXXXXXXXXXXXX
703. Comm. pd. at settlement to NIEGO REAL ESTATE				6400.00
704.				
800. ITEMS PAYABLE IN CONNECTION WITH LOAN				
801. Loan Orig. Fee % to				
802. Loan Discount Fee % to				
803. Appraisal Fee 275.00 to DANIEL S TERPINAS		250.00 POC	25.00	
804. Credit Report to				
805. Lender Insp. Fee to				
806. Application Fee to				
807. Assumption Fee to				
808. Doc. Prep. Fee to				
809. Tax Service Fee 61.00 to HARRIS TRUST & SAVINGS BANK			61.00	
810.				
811.				
812. FLOOD CERT FEE TO STEWART MORT INFOR			19.00	
813.				
900. ITEMS REQUIRED BY LENDER TO BE PAID IN ADVANCE				
901. Interest from 07/24/00 to 08/01/00 at $ 36.6500 /day			293.20	
902. Mortgage Insurance Premium for . mos. to				
903. Hazard Insurance Premium for yrs. to				
904. yrs. to				
905.				
1000. RESERVES DEPOSITED WITH LENDER				
1001. Hazard Insurance mo. at $ /mo.				XXXXXXXXXXXXX
1002. Mortgage Insurance 2.00 mo. at $ 99.45 /mo.			198.90	XXXXXXXXXXXXX
1003. City property taxes mo. at $ /mo.				XXXXXXXXXXXXX
1004. County property taxes 2.00 mo. at $ 184.83 /mo.			369.66	XXXXXXXXXXXXX
1005. Annual assessments mo. at $ /mo.				XXXXXXXXXXXXX
1006. mo. at $ /mo.				XXXXXXXXXXXXX
1007. mo. at $ /mo.				XXXXXXXXXXXXX
1008. mo. at $ /mo.				XXXXXXXXXXXXX
1009. Aggregate Reserve Adjustment				XXXXXXXXXXXXX
1100. TITLE CHARGES				
1101. Settlement or closing fee to ATTORNEYS' TITLE GUARANTY FUND, INC 260.0			260.00	
1102. Abstract or title search to				
1103. Title examination to				
1104. Title insurance binder to				
1105. Document preparation to				
1106. Notary fees to				
1107. Attorney's fees $ to				
(Includes above items No.:)			XXXXXXXXXXXXX	XXXXXXXXXXXXX
1108. Title insurance to ATTORNEYS' TITLE GUARANTY FUND,INC.			185.00	625.60
(Includes above items No.: 1102, 1103, 1104, 1105, 1106)			XXXXXXXXXXXXX	XXXXXXXXXXXXX
1109. Lender's coverage $ 163000.00			XXXXXXXXXXXXX	XXXXXXXXXXXXX
1110. Owner's coverage $ 168000.00			XXXXXXXXXXXXX	XXXXXXXXXXXXX
1111.				
1112. Attorney's Fees $ 500.00 O to William E. Gomolinski				500.00
1113. ZONING & WATER				85.00
1114. RELEASE FEE				25.60
1200. GOVERNMENT RECORDING AND TRANSFER CHARGES				
1201. Recording fees: Deed $ 0.00 Mort. $ 0.00 Release $ 0.00			71.00	
1202. City/county tax/stamps: Deed $ 84.00 Mortgage $ 0.00				84.00
1203. State tax/stamps: Deed $ 168.00 Mortgage $ 0.00				168.00
1204. City Stamps				
1205. Chicago City Stamps			1260.00	
1206.				
1300. ADDITIONAL SETTLEMENT CHARGES				
1301. Survey $ 175.00 O to LANDMARK ENGINEERING				175.00
1302. Pest Insp. $ to				
1303. EPA ENDORSEMENT			30.00	
1304.				
1305.				
1400. TOTAL SETTLEMENT CHARGES (enter on lines 103 and 502, Sections J and K)			2772.76	8063.00

H.U.D. SETTLEMENT STATEMENT

Form Approved OMB No. 2502-0265

I have carefully reviewed the HUD-1 Settlement Statement and to the best of my knowledge and belief, it is a true and accurate statement of all receipts and disbursements made on my account or by me in this transaction. I further certify that I have received a copy of the HUD-1 Settlement Statement.

/s/ Ulysses Bahuelos /s/ Gregory F. Weizeorick

/s/ Nancy Quintero /s/ Margaret A. Weizeorick

Borrowers Sellers

The HUD-1 Settlement Statement which I have prepared is a true and accurate account of this transaction. I have caused or will cause the funds to be disbursed in accordance with this statement.

/s/ [Illegible] 7/24/00

Settlement Agent Date

WARNING: It is a crime to knowingly make false statements to the United States on this or any other similar form. Penalties upon conviction can include a fine and imprisonment. For details, see Title 18, U.S. Code, Section 1001 and Section 1010.

Taxpayer Identification Number Solicitation

You are required by law to provide the closing agent with your correct taxpayer identification number. If you do not provide the closing agent with your correct taxpayer identification number, you may be subject to civil or criminal penalties imposed by law.

Certification – Under penalties of perjury, I certify that the taxpayer identification number and address shown in Box E and/or this page of this Settlement Statement are correct.

/s/ Gregory F. Weizeorick
Seller

/s/ Margaret A. Weizeorick
Seller

Forwarding Address _____

_____

_____

_____ _____

Taxpayer I.D. Taxpayer I.D.

Special Instructions _____

_____

_____

SELLER INSTRUCTIONS: If this real estate was your principal residence, file Form 2119, Sale or Exchange of Principal Residence, for any gain, with your income tax return; for other transactions, complete the applicable parts of Form 4797, Form 6252 and/or Schedule D (Form 1040).

SUBSTITUTE FORM 1099 SELLER STATEMENT: The Information contained in blocks E, G, H and I and in line 401 (or, if line 401 is asterisked, lines 403 and 404) and/or this page is important tax information and is being furnished to the Internal Revenue Service. If you are required to file a return; a negligence penalty or other sanction will be imposed upon you if this item is required to be reported and the IRS determines that it has not been reported.

ATTORNEYS' TITLE GUARANTY FUND, INC.

_____

(3)

No. 03-859

Supreme Court, U.S.
FILED
JAN 22 2004
OFFICE OF THE CLERK

In the Supreme Court of the United States

ABN AMRO Mortgage Group, Inc.,
a Delaware corporation,
Petitioner,

v.

GREGORY AND MARGARET WEIZEORICK,
Individually, and on behalf of all others similarly situated,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITIONER'S REPLY BRIEF

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INTRODUCTION

The Court of Appeals erroneously held that the Real Estate Settlement Procedures Act, 12 U.S.C. § 2607(b) ("RESPA") does not "require that the plaintiff allege that all the parties involved in the fee splitting have knowledge of their participation in, or a conspiracy to join in, an illegal arrangement." (Petition, App. B, p. 13a.) The Seventh Circuit's decision should not be allowed to stand because it effectively transformed RESPA from an anti-kickback statute into a strict liability statute that punishes mere fee collection oversights. The effect of the Court of Appeals' decision is to make RESPA violations out of untold thousands of ordinary errors committed by parties far removed from the closing of a federally related mortgage transaction. This radical expansion of the scope of RESPA is not supported by either the plain language of the statute, or any case-law.

Contrary to the Weizeoricks' assertion, knowledge of the alleged illegal fee split is, in fact, an implicit but essential component of the fee split element of a claim under Section 8(b) of RESPA. The Weizeoricks were required to plead that AAMG knowingly participated in the alleged fee split in order to maintain a cause of action against AAMG under Section 8(b), which they failed to do.

Despite the Weizeoricks' contention, the Court of Appeals' holding in this case, does, in fact, conflict with its earlier decisions. Specifically, the Court of Appeals' decision conflicts with its prior decision in *Echevarria v. Chicago Title & Trust Co.*, 256 F.3d 623 (7th Cir. 2001), which held that RESPA requires allegations that the defendant knowingly "***shared*** an unearned fee with a third party" and mere retention of a portion of the total sum paid does not constitute a fee-split for purposes of RESPA. *Id.*, 256 F.3d at 626-27 (emphasis added).

Further, *certiorari* should be granted because the Court of Appeals has decided an important question of federal law that has not been, but should be, settled by the Supreme Court – namely, whether Section 8(b) of the Real Estate Settlement Procedures Act, 12 U.S.C. § 2607(b) can be used to punish a lender who merely receives a fee for a service that it intends to perform but ultimately does not perform without knowing that another party has charged a similar fee. S. Ct. Rule 10(c).

REASONS TO GRANT THE WRIT

I. The Weizeoricks Were Required But Failed to Plead Knowledge As an Implicit But Essential Element of a Claim Under Section 8(b) of RESPA

A. The Weizeoricks Are Required to Plead All the Elements of a Claim

In their Brief in opposition to AAMG's Petition for a Writ of Certiorari, the Weizeoricks argue that there is no basis for review because, even if knowledge is an element of a claim under Section 2607(b) of RESPA, the Weizeoricks were not required to allege that AAMG had knowledge of the purported fee split since, under the federal notice pleading system, "a plaintiff need not plead every element of a cause of action to state a claim." (Response, p. 5.) However, the Weizeoricks' argument misstates the law and is misleading because a plaintiff is required to plead all of the elements of his cause of action.

While the Federal Rules of Civil Procedure require only a "short and plain statement of the claim" asserted and a plaintiff is not required to set out in detail the ***facts*** upon which he bases his claim, a plaintiff is still required under the Rules to plead all the ***elements*** of his cause of action. *See Palda v. General Dynamics Corp.*, 47 F.3d 872 (7th Cir. 1995) (dismissing the plaintiff's action for failing to plead all

the elements of his claim); *Benson v. Cady*, 761 F.2d 335, 338 (7th Cir. 1985) (explaining that "[a]lthough the Federal Rules of Civil Procedure do not require a plaintiff to set out in detail the facts upon which he bases his claim, he must set out sufficient factual matter to outline the elements of his cause of action or claim, proof of which is essential to his recovery") (internal citations omitted).

The Weizeoricks contend that, under the federal notice pleading requirements, "a plaintiff need not plead every element of a cause of action to state a claim." (Response, p. 5.) In support of this proposition, the Weizeoricks cite *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002), and *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163 (1993). However, contrary to the Weizeoricks' assertion, neither *Swierkiewicz* nor *Leatherman* stands for the proposition that a plaintiff need not plead the ***elements*** of his purported cause of action or claim. Rather, *Swierkiewicz* and *Leatherman* state only that a plaintiff need not set out in detail the ***facts*** upon which he bases his claim. *Swierkiewicz*, 534 U.S. at 511; *Leatherman*, 507 U.S. at 168.

Contrary to the Weizeoricks' assertion, knowledge of the alleged illegal fee split is, in fact, an implicit but essential component of the fee split element of a claim under Section 8(b) of RESPA. The Weizeoricks were required to plead that AAMG knowingly participated in the alleged fee split in order to maintain a cause of action against AAMG under Section 8(b), which they failed to do.

B. Knowledge is an Implicit and Essential Component of a Fee Split That Must Be Alleged

Section 8(b) of RESPA provides:

Splitting charges. No person shall give and no

> person shall accept any portion, split, or percentage of any charge made or received for the rendering of a real estate settlement service in connection with a transaction involving a federally related mortgage loan other than for services actually performed.

In order to state a claim for violation of Section 8(b) of RESPA, the Weizeoricks must allege that AAMG knowingly "***shared*** an unearned fee with a third party." *Echevarria*, 256 F.3d at 627 (emphasis added). The mere retention of a portion of the total sum paid ***does not*** constitute a fee split for purposes of RESPA. *Id.* at 626-27.

The Weizeoricks repeatedly assert that AAMG "concedes in the Petition that knowledge is not an element of a claim under § 2607(b) of RESPA." (Response, pp. 1, 3, 7.) However, AAMG did no such thing. In its Petition, AAMG actually stated that "[c]ontrol over the closing and knowledge of duplicative fee collection, while not separate elements of a RESPA claim, are indicia of whether the accused party was engaged in the type of improper kick-back or fee-split prohibited by RESPA." (Petition, p. 10.)

The case of *Christakos v. Intercounty Title Co.*, 196 F.R.D. 496 (N.D. Ill. 2000), was relied upon by the Weizeoricks in opposition to AAMG's Petition and cited by the Court of Appeals in support of its novel holding. However, the *Christakos* case actually proves AAMG's point that knowledge of the duplicative payment is an implicit and essential component of a fee split or sharing that must be alleged in order to state a claim for violation of Section 8(b) of RESPA. The *Christakos* case in no way stands for the proposition that a lender may be punished for merely charging a duplicative, unearned fee.

In the *Christakos* case, Ms. Christakos refinanced her home and closed the transaction, with the title company acting

as settlement agent at the closing. As in our case, the prior mortgagee issued a payoff letter which included a charge for recording the release of the existing mortgage. At closing, the title company charged an additional fee for the same service. Then, in a situation totally ***opposite*** from that found in our case, ***the existing lender***, not the title company, recorded the release of Ms. Christakos' mortgage. The court held that Ms. Christakos' complaint stated a viable RESPA claim ***against the title company that had control over the closing*** and knowledge of all fees being charged.

Significantly, the *Christakos* holding was based upon allegations that the two recordation fee payments "were made from the ***same pool of funds*** from the loan proceeds over which [the title company], as settlement agent, had ***control and directed payments made from***." 196 F.R.D. at 503 (emphasis added). In other words, in *Christakos*, the title company charged a fee to record the release of the existing mortgage even though it ***simultaneously*** was collecting a fee for the prior mortgagee to record the same release. Thus, the title company knowingly charged the owner two fees for the identical service that could only be performed once.

In contrast, the Weizeoricks' Complaint in the instant case does not allege that the moneys paid to AAMG and to the title company were ever "pooled" by AAMG in any way, that the money paid to the title company was ever in AAMG's control or, that AAMG ***knew*** that the title company even received a recording fee.[1] Accordingly, the fee-split required to invoke

---

[1] Contrary to the Weizeoricks' contention, the Complaint does not contain allegations that AAMG knowingly engaged in conduct prohibited under Section 8(b) of RESPA. (Response, p. 5.) At this late date, in response to AAMG's Petition, the Weizeoricks attempt to amend their Complaint through arguments of counsel. However, the Weizeoricks' improper attempt to retroactively alter the record is of no avail. Moreover, the

RESPA is plainly lacking here. Unlike the title company in *Christakos*, AAMG did not have control over the settlement of the sale, was not even a party to that settlement and had no knowledge of any terms of the settlement, including the fact that the title company was going to charge a fee already included in AAMG's Payoff Statement, as AAMG issued its Payoff Statement on July 18, 2000, six days prior to the July 24, 2000 closing.

Contrary to the Weizeoricks' assertion, knowledge of the alleged illegal fee split is, in fact, an implicit but essential component of the fee split element of a claim under Section 8(b) of RESPA. The Weizeoricks were required to plead that AAMG knowingly participated in the alleged fee split in order to maintain a cause of action against AAMG under Section 8(b), but failed to do so.

II. The Court of Appeals' Decision Impermissibly Expanded the Scope of Liability Under § 8(b) of RESPA

The Court of Appeals acknowledged that subjecting an existing lender to RESPA liability for mere wrongful fee collection "would radically, and wrongly, expand the class of cases to which RESPA applies." (Petition, App. B, p. 9a.) However, despite this acknowledgement, the Court of Appeals held that RESPA does not "require that the plaintiff

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referenced allegation does not support the inferences urged by the Weizeoricks. The Weizeoricks' allegation that the title company and not AAMG filed the release of the Weizeoricks' mortgage does not support the conclusion that AAMG knew of the allegedly wrongful fee split. AAMG charged the recording fee six days prior to the closing of the Weizeoricks' real estate transaction and had no way of knowing that the title company later would record the instrument. The only reasonable inference is that AAMG received an unearned fee, which is not, in itself, actionable under Section 8(b).

allege that all the parties involved in the fee splitting have knowledge of their participation in, or a conspiracy to join in, an illegal arrangement." (Petition, App. B, p. 13a.) By holding that Section 8(b) of RESPA can be used to punish parties with no knowledge that their fees are duplicative of separate fees charged by others, the Court of Appeals effectively transformed RESPA from an anti-kickback statute into a strict liability statute that punishes mere fee collection oversights. The effect of the Court of Appeals' decision is to make RESPA violations out of untold thousands of ordinary errors committed by parties far removed from the closing of a federally related mortgage transaction. This radical expansion of the scope of RESPA is not supported by either the plain language of the statute, or any case-law.

In an attempt to justify the Court of Appeals' radical expansion of the scope of RESPA's reach, the Weizeoricks argue that the Court of Appeals' statement that knowledge is not an element of a claim under Section 8(b) "does not expand the scope of that statute because there is no basis in the first instance for concluding that § 2607(b) requires proof of knowledge." (Response, p. 7.) However, in making this argument, the Weizeoricks notably fail to address the fact that the Court of Appeals' holding conflicts with the common understanding that RESPA is fundamentally an anti-kickback statute. *See Krzalic v. Republic Title Co.*, 314 F.3d 875, 877 (7th Cir. 2002) (finding that Section 8(b) of RESPA is an "anti-kickback provision"); *Mercado v. Calumet Fed. Sav. & Loan Ass'n*, 763 F.2d 269, 270 (7th Cir. 1985) (holding that RESPA is fundamentally "an anti-kickback statute").

The Weizeoricks argue that the Court of Appeals' holding in *United States v. Gannon*, 684 F.2d 433 (7th Cir. 1981), somehow supports the Court of Appeals' finding that Section 8(b) of RESPA can be used to punish a lender who merely receives a fee for a service that it intends to perform but

ultimately does not perform without knowing that another party has charged a similar fee. However, *Gannon* does not stand for that proposition.

In *Gannon*, the defendant, a counterman in the Torrens section of the county recorder of deeds, charged bank employees an extra two or three dollars above the statutory fee to process applications promptly. Based on this conduct, the Government filed an action against the defendant, asserting that the defendant had violated Section 8(b) of RESPA. In defense of his actions, the defendant argued, among other things, that he could not be held liable under Section 8(b) because he had no knowledge that the extra payments were being passed onto the banks' customers. The Court rejected the defendant's argument. The Court held that there was no support in the legislative history of Section 8(b) for the defendant's contention that the Government was required to prove that ***the defendant knew that the extra payments were being paid directly by the banks' customers***. 684 F.2d at 440.

III. The Court of Appeals' Decision Conflicts With Its Earlier Decision in *Echevarria v. Chicago Title & Trust Co.*

Contrary to the Weizeoricks' assertion, the Court of Appeals' holding in this case, does, in fact, conflict with its earlier decisions. Specifically, the Court of Appeals' decision conflicts with its prior decision in *Echevarria v. Chicago Title & Trust Co.*, 256 F.3d 623 (7th Cir. 2001).

In *Echevarria*, as in the present case, the plaintiffs argued that a fee-split need not be literal for purposes of RESPA, but that, rather, fees are split whenever two entities receive fees for a service and the sum total of those fees is more than the service actually cost. 256 F.3d at 626. Specifically, the plaintiffs in *Echevarria* argued that a $45 fee that they paid to

their title company "was illegally split when [the title company] paid a third party, the County Recorder, a portion of the fees . . . and retained the overcharges . . . for itself." *Id.* According to the plaintiffs, a "focus on the whole $45.00" revealed a fee split because $45 was the total amount plaintiffs paid for recordation of the release of their mortgage, and the defendant, in the end, retained a portion of that sum. *Id.* However, the Court of Appeals rejected the plaintiffs' argument, explaining that RESPA requires allegations that the defendant actually "**shared** an unearned fee with a third party." *Id.* at 627 (emphasis added). The Court held that mere retention of a portion of the total sum paid does not constitute a fee-split for purposes of RESPA. *Id.*, 256 F.3d at 626-27.

In contrast to its holding in *Echevarria*, the Court of Appeals held here that Section 8(b) of RESPA can be used to punish an existing lender whenever a title company, who controls the settlement proceeds, receives a **separate fee** for the same service **without the knowledge of the lender**. Plainly, the Court of Appeals' holding here conflicts with its prior decision in *Echevarria*.

IV. This Case Clearly Meets the Criteria for Review Under Supreme Court Rule 10(c)

In their Brief in opposition to AAMG's Petition, the Weizeoricks argue that *certiorari* should be denied because this case fails to meet those criteria for review under Supreme Court Rule 10 that are triggered by a conflict between a court of appeals decision and a decision of another court of appeals, a state court of last resort or this Court. (Response, p. 3.) However, under the plain language of Rule 10, *certiorari* also may be granted where "a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an

important federal question in a way that conflicts with relevant decisions of this Court." S. Ct. Rule 10(c).

Here, the Court of Appeals has decided an important question of federal law that has not been, but should be, settled by the Supreme Court – namely, whether Section 8(b) of the Real Estate Settlement Procedures Act, 12 U.S.C. § 2607(b) can be used to punish a lender who merely receives a fee for a service that it intends to perform but ultimately does not perform without knowing that another party has charged a similar fee.[2]

CONCLUSION

A writ of certiorari should issue to review the judgment and opinion of the Seventh Circuit which effectively transformed RESPA from an anti-kickback statute into a strict liability statute that punishes mere fee collection oversights and made RESPA violations out of untold thousands of ordinary errors committed by parties far removed from the closing of a federally related mortgage transaction.

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[2] Contrary to the Weizeoricks' contention, the question presented by AAMG's Petition is not whether the Court of Appeals correctly found that the Weizeoricks' Complaint states a claim under the notice pleading requirements of the Federal Rules of Civil Procedure. Rather, the issue here is whether, in holding that the Weizeoricks have stated a claim under Section 2607(b) of RESPA, the Court of Appeals correctly found that Section 8(b) of RESPA can be used to punish a lender who merely receives a fee for a service that it intends to perform but ultimately does not perform without knowing that another party has charged a similar fee.

Respectfully submitted,

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